

## **EXHIBIT 11**

Page 1

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2                   UNITED STATES DISTRICT COURT  
3                   DISTRICT OF MASSACHUSETTS

4                   -----X

5       IN RE CREDIT SUISSE - AOL       )  
6       SECURITIES LITIGATION           )  
7                                          )  
8                                          ) Case No. 1:02 CV 12146  
9                                          ) (Judge Gertner)  
10                                         )  
11       This document relates to:      )  
12                                         )  
13       ALL ACTIONS                    )  
14                                         )  
15                                         -----X

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17                   VIDEOTAPED DEPOSITION  
18                   OF  
19                   BERNARD BLACK  
20                   New York, New York  
21                   Tuesday, August 19, 2008

22

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Reported by:

24       ANNETTE ARLEQUIN, CCR, RPR  
25       JOB NO. 18036

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Page 3

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5                   August 19, 2008  
6                   9:36 a.m.  
7  
8                   Videotaped deposition of  
9                   BERNARD BLACK, held at the offices of  
10                  Davis Polk & Wardwell, 450 Lexington  
11                  Avenue, New York, New York, before  
12                  Annette Arlequin, a Certified Court  
13                  Reporter, a Registered Professional  
14                  Reporter and a Notary Public of the State  
15                  of New York.

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2                   A P P E A R A N C E S:  
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4  
5                   KAPLAN FOX & KILSHEIMER LLP  
6                   Attorneys for Plaintiff Bricklayers and  
7                   Trowel Trades International Pension Fund,  
8                   the Proposed Class and Dr. Hakala  
9                   850 Third Avenue, 14th Floor  
10                  New York, New York 10022  
11                  BY: FREDERIC S. FOX, ESQ.  
12                  MELINDA RODON, ESQ.  
13  
14  
15                   DAVIS POLK & WARDWELL  
16                   Attorneys for Defendants Credit Suisse  
17                   First Boston LLC and Credit Suisse First  
18                   Boston USA  
19                   450 Lexington Avenue  
20                  New York, New York 10017  
21                  BY: AVI GESSER, ESQ.  
22                  DANIEL J. SCHWARTZ, ESQ.  
23                  SANDRA WEST, ESQ.  
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Page 5

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2                   A P P E A R A N C E S (Cont'd.):  
3  
4  
5                   SKADDEN ARPS SLATE, MEAGHER & FLOM LLP  
6                   Attorneys for Laura Martin  
7                   Four Times Square  
8                   New York, New York 10036  
9                  BY: MICHAEL W. MITCHELL, ESQ.  
10  
11  
12                  ALSO PRESENT:  
13  
14                  SILVIO FACCHIN, Legal Video Specialist  
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2                   IT IS HEREBY STIPULATED AND AGREED,  
3                   by and between the attorneys for the  
4                   respective parties herein, that filing  
5                   and sealing be and the same are hereby  
6                   waived  
7                   IT IS FURTHER STIPULATED AND AGREED  
8                   that all objections, except as to the  
9                   form of the question, shall be reserved  
10                  to the time of the trial.  
11                  IT IS FURTHER STIPULATED AND AGREED  
12                  that the within deposition may be sworn  
13                  to and signed before any officer  
14                  authorized to administer an oath, with  
15                  the same force and effect as if signed  
16                  and sworn to before the Court.  
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<p style="text-align: center;">Page 6</p> <p>1                   * Proceedings *</p> <p>2         THE VIDEOGRAPHER: This is the tape</p> <p>3         labeled No. 1 of the videotaped deposition</p> <p>4         of Bernard Black in the matter of In Re</p> <p>5         Credit Suisse - AOL Securities Litigation.</p> <p>6         We are now going on the record. The</p> <p>7         time is 9:36 a.m.</p> <p>8         Counsel will state their appearances</p> <p>9         for the record.</p> <p>10        MR. GESSER: Avi Gesser with Davis</p> <p>11        Polk &amp; Wardwell for the Credit Suisse</p> <p>12        defendants.</p> <p>13        MR. SCHWARTZ: Daniel Schwartz, also</p> <p>14        Davis Polk &amp; Wardwell, for the Credit</p> <p>15        Suisse defendants.</p> <p>16        MS. WEST: Sandra West, Davis Polk &amp;</p> <p>17        Wardwell, for the Credit Suisse defendants.</p> <p>18        MR. MITCHELL: Michael Mitchell,</p> <p>19        Skadden, Arps, Slate, Meagher &amp; Flom for</p> <p>20        defendant Laura Martin.</p> <p>21        MR. FOX: Frederic Fox, Kaplan Fox &amp;</p> <p>22        Kilsheimer, for the plaintiffs and the</p> <p>23        witness.</p> <p>24        MS. RODON: Melanie Rodon, also with</p> <p>25        Kaplan Fox &amp; Kilsheimer, for plaintiffs and</p>	<p style="text-align: center;">Page 7</p> <p>1                   * Proceedings *</p> <p>2         the witness.</p> <p>3         THE VIDEOGRAPHER: Will the court</p> <p>4         reporter please swear in the witness.</p> <p>5                   *       *       *</p> <p>6         BERNARD BLACK, called as a witness,</p> <p>7         having been duly sworn by a Notary</p> <p>8         Public, was examined and testified as</p> <p>9         follows:</p> <p>10        EXAMINATION BY</p> <p>11        MR. GESSER:</p> <p>12        <b>Q. Professor Black, we met earlier but</b></p> <p>13        <b>just for the record, I'm Avi Gesser and I'll be</b></p> <p>14        <b>asking the questions today.</b></p> <p>15        <b>You've been deposed before; is that</b></p> <p>16        <b>right?</b></p> <p>17        A. Yes.</p> <p>18        <b>Q. Many times?</b></p> <p>19        A. Some number of times.</p> <p>20        <b>Q. Okay. So I'm not going to --</b></p> <p>21        A. I don't know if I want to admit to</p> <p>22        many.</p> <p>23        <b>Q. Okay. I'm not going to go over all</b></p> <p>24        <b>the ground rules, but we've got a lot to cover</b></p> <p>25        <b>and so it would be helpful for me if you'd just</b></p>
<p style="text-align: center;">Page 8</p> <p>1        <b>B. Black</b></p> <p>2        <b>listen to my question and then answer the</b></p> <p>3        <b>question that I ask.</b></p> <p>4        <b>Do you understand that?</b></p> <p>5        A. Yes.</p> <p>6        <b>Q. I'm going to be using a number of</b></p> <p>7        <b>abbreviations and I just want to make sure we</b></p> <p>8        <b>understand each other when we use abbreviations.</b></p> <p>9        <b>So I'll be using CSFB or Credit Suisse to refer</b></p> <p>10       <b>to Credit Suisse First Boston at the time that's</b></p> <p>11       <b>relevant here, which is the 2000 to 2002 time</b></p> <p>12       <b>frame.</b></p> <p>13       <b>Do you understand that?</b></p> <p>14       A. Yes.</p> <p>15       <b>Q. Okay. Now I'm going to be using the</b></p> <p>16       <b>term "AOL" to refer to the merged Time Warner</b></p> <p>17       <b>America Online entity, okay?</b></p> <p>18       A. Okay. I will try -- the way I've</p> <p>19       dealt with that is to call that AOL TW to</p> <p>20       separate AOL and TW, but I will try --</p> <p>21       <b>Q. And if --</b></p> <p>22       A. I will try to understand your</p> <p>23       references.</p> <p>24       <b>Q. And if ever there's some confusion as</b></p> <p>25       <b>to which entity we're talking to, you'll let me</b></p>	<p style="text-align: center;">Page 9</p> <p>1        <b>B. Black</b></p> <p>2        <b>know.</b></p> <p>3        A. If it's okay, I will try to use my</p> <p>4        own terms, which is AOL as AOL alone, TW as the</p> <p>5        Time Warner side and AOL TW as the combined.</p> <p>6        How's that?</p> <p>7        <b>Q. No. I'm going to ask you to refer to</b></p> <p>8        <b>the combined entity as AOL and the America</b></p> <p>9        <b>Online as America Online and Time Warner as Time</b></p> <p>10       <b>Warner.</b></p> <p>11       A. Okay. I will try.</p> <p>12       <b>Q. Okay. Thank you.</b></p> <p>13       <b>And unless I expressly say that we're</b></p> <p>14       <b>talking about a different time frame, let's</b></p> <p>15       <b>assume we're talking about 2001 for all my</b></p> <p>16       <b>questions.</b></p> <p>17       A. Okay.</p> <p>18       <b>MR. FOX: And I would just note for</b></p> <p>19       <b>the record that the witness used certain</b></p> <p>20       <b>terms in his report and, you know, to the</b></p> <p>21       <b>extent he's comfortable using those terms</b></p> <p>22       <b>and the terms are in his report that way,</b></p> <p>23       <b>as he indicated, he will try and use the</b></p> <p>24       <b>terms you want him to use but they may be</b></p> <p>25       <b>different from what he's using in his</b></p>

<p style="text-align: center;">Page 10</p> <p>1                   B. Black 2 report. 3 BY MR. GESSER: 4     <b>Q.</b> And I'm not trying to make it 5 difficult for you, it's just that before you 6 came along to this case, those are the terms 7 that we have been using and so it will create I 8 think confusion unless we try and stay 9 consistent. I will as best I can make it clear 10 what I'm talking about. If you can do the same, 11 hopefully we won't have any confusion, but I'm 12 just -- that's -- those are the terminology -- 13 that's the terminology I'll be using. I 14 recognize you use different terminology in your 15 report, so I'm flagging that and I'm asking you 16 if you could just stick with the terminology 17 that I'm using in my questioning. 18     A. I will try. 19     <b>Q.</b> Thank you. 20       So you've been retained as an expert 21 by plaintiffs in this matter; is that correct? 22     A. Yes. 23     <b>Q.</b> Do you know when you were retained? 24     A. May, June time frame. 25     <b>Q.</b> Okay. Do you have a retention</p>	<p style="text-align: center;">Page 11</p> <p>1                   <b>B. Black</b> 2 letter? 3     A. No. 4     <b>Q.</b> What's the terms of your retention? 5     A. Basically I bill on an hourly basis. 6     <b>Q.</b> And what is your hourly rate? 7     A. \$800. 8     <b>Q.</b> And you're not receiving any other 9 compensation as a result of your testimony? 10    A. No. 11    <b>Q.</b> And no one else is receiving any 12 compensation -- 13    A. No. 14    <b>Q.</b> -- as a result of your testimony? 15    A. Not that I know of. 16    <b>Q.</b> Are you using anyone to do support 17 work for you? 18    A. No. 19    <b>Q.</b> So all the calculations were all done 20 by you? 21    A. By me. 22    <b>Q.</b> And any idea what your total 23 hourly -- your total hours worked to date are? 24    A. I would estimate 80. 25    <b>Q.</b> And that includes preparing for</p>
<p style="text-align: center;">Page 12</p> <p>1                   <b>B. Black</b> 2 today's deposition? 3     A. Yes. 4     <b>Q.</b> How much time do you think you spent 5 preparing for today's deposition? 6     A. Yesterday on the plane and then in 7 the Kaplan Fox offices, so five hours. 8     <b>Q.</b> Okay. Have you worked with Kaplan 9 Fox before? 10    A. Yes, indirectly. I worked -- I 11 prepared an expert report in state securities 12 litigation against AOL involving the AOL 13 financial statements during the period from 2000 14 through 2002, and Kaplan Fox was one of the 15 plaintiff firms in that case. 16     <b>Q.</b> Have you worked with Kaplan Fox other 17 than in that instance? 18    A. I do not believe so. 19     <b>Q.</b> Okay. Have you worked with any of 20 the other experts in this case previously? 21     MR. FOX: Objection. 22    A. As an expert, no. 23       Reinier Kraakman is my coauthor on at 24 least a couple of papers. 25     <b>Q.</b> Have you talked with any of the</p>	<p style="text-align: center;">Page 13</p> <p>1                   <b>B. Black</b> 2 experts in this case about this case? 3     A. No, I have not. 4     <b>Q.</b> You indicated that you did all the 5 calculations yourself. 6     A. Back up. I have worked at least once 7 before on a case where I believe Scott Hakala 8 was also involved. 9     <b>Q.</b> What case was that? 10    A. I believe that was a corporate case 11 involving Shell Oil's acquisition of Pennzoil. 12 I had no direct contact with him -- 13     <b>Q.</b> When was that? 14    A. -- other than I believe that he 15 worked on the case. 16       It was a trial in 2005. 17     <b>Q.</b> Have you recommended any of the 18 experts in this case to lawyers who have 19 retained you? 20     MR. FOX: Objection. 21    A. Not in this case, no. 22     <b>Q.</b> In any case? 23    A. I have suggested from time to time 24 that people contact Reinier Kraakman for when 25 they've got an issue that involves market</p>

1                   B. Black  
 2 efficiency.

3           **Q. Do you know if he's ever done the  
 4 same for you?**

5           A. I don't know.

6           **Q. I don't mean for market efficiency.**

7                 **Has he ever recommended you --**

8           A. I do not know.

9           **Q. Okay. I'm sorry. So you indicated  
 10 that you had done the calculations for your  
 11 report yourself.**

12          A. Yes.

13          **Q. What in your background or education  
 14 gives you, in your view, the expertise to  
 15 conduct such calculations?**

16          MR. FOX: Objection.

17          Is there a specific calculation that  
 18 you're talking about?

19 BY MR. GESSER:

20          **Q. The tables and calculations that  
 21 appear in your report.**

22          A. I suppose I'm not following the  
 23 question. I'm trying to think, okay, I know how  
 24 to use Excel and that's presumably not the  
 25 question that you're asking, but --

1                   B. Black

2           **Q. I mean I know how to use Excel. I  
 3 mean a lot of people know how to use Excel.  
 4 Does that mean that anyone can do the  
 5 calculations that you did in your report?**

6           MR. FOX: Objection.

7          A. At some level the calculations in the  
 8 report are arithmetic or at most algebra, so I  
 9 think my answer to that would be yes, but a  
 10 different question would be why did you do the  
 11 particular calculations that you did.

12          **Q. Okay. Well, let me ask, to do the  
 13 calculations that you did and for them to be in  
 14 some way meaningful to the issues in this  
 15 litigation, so not just to run the calculations  
 16 but to select the appropriate numbers and reach  
 17 whatever conclusions you reached, what, in your  
 18 view, gives you the expertise to conduct that  
 19 kind of analysis?**

20          MR. FOX: Objection.

21          A. I suppose that I consider myself to  
 22 be generally knowledgeable in finance and in the  
 23 valuation of companies.

24          I teach corporate finance.

25          I've been working on a textbook for

1                   B. Black

2 law schools on corporate finance that I may or  
 3 may not ever finish.

4          I have a joint position at the  
 5 University of Texas Law School and in the  
 6 finance department at the Macomb School of  
 7 Business at the University of Texas, and I've  
 8 done a lot of these calculations over the course  
 9 of, you know, some number of years. I think  
 10 that would be my best answer.

11          **Q. Okay. So you consider yourself an  
 12 expertise in -- you consider yourself an expert  
 13 in corporate finance?**

14          A. At a general level, yes. There will  
 15 be of course subareas of corporate finance where  
 16 I think I know something and subareas where I  
 17 think that's outside my area of expertise.

18          **Q. And you also consider yourself an  
 19 expert in securities laws and practice?**

20          A. Yes.

21          **Q. And is that part of the expertise  
 22 that you're bringing to bear in your report?**

23          A. Certainly some knowledge about  
 24 practice in the securities markets I think is  
 25 relevant to my report, so call it general

1                   B. Black

2 knowledge about what it is that investment banks  
 3 do, that analysts do, what kinds of information  
 4 investors are looking for from analysts.

5          I don't think there's any law in my  
 6 report.

7          **Q. And your expertise in securities  
 8 practice, does that come from an academic  
 9 inquiry that you've done or from a practical,  
 10 from practical experience that you have?**

11          MR. FOX: Objection.

12          A. I'd say primarily -- well, let's call  
 13 it a few sources. So one is that an increasing  
 14 number of years ago I was in a transactional M&A  
 15 practice at Skadden, Arps. Mr. Mitchell may not  
 16 remember me as a junior associate, but I  
 17 remember him.

18          MR. MITCHELL: I remember you.

19          A. Since then I've written reasonably  
 20 extensively about corporate acquisitions, about,  
 21 you know, in a field that has come to be called  
 22 law and finance which is kind of how law affects  
 23 financial markets.

24          You know, I've been on the boards of  
 25 directors of public companies.

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Page 19

1                   B. Black  
 2         I've probably done a moderate amount  
 3         of expert witness work in securities cases of  
 4         various kinds.  
 5         I think that's what I would look at.  
 6       **Q. You've never been a financial**  
 7       **analyst.**  
 8       A. Correct.  
 9       **Q. You've never been an investment**  
 10      **banker.**  
 11      A. Correct.  
 12      **Q. Your publications that relate to**  
 13      **analysts, securities analysts, do you off the**  
 14      **top of your, I mean I can show you your report,**  
 15      **off the top of your head do you know what those**  
 16      **are?**  
 17      A. I have not written specifically about  
 18      securities analysts.  
 19      **Q. Okay.**  
 20      A. There are maybe a few references in  
 21      my textbook on corporate acquisitions, but I've  
 22      not written specifically about securities  
 23      analysts.  
 24      **Q. Are you familiar with the case law on**  
 25      **research analysts and their impact on stock**

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Page 21

1                   B. Black  
 2       **Q. Marketing?**  
 3       A. No.  
 4       **Q. Okay. I'm going to mark as Exhibit**  
 5      **1, your rebuttal report.**  
 6      **(Defendants' Exhibit Black 1,**  
 7      **Rebuttal Report of Professor Bernard Black,**  
 8      **marked for identification, as of this**  
 9      **date.)**  
 10     **BY MR. GESSER:**  
 11     **Q. I presume you're familiar with**  
 12     **Exhibit 1?**  
 13     A. I certainly hope so.  
 14     MR. FOX: You're calling this  
 15     Black-1?  
 16     MR. GESSER: Yes.  
 17     **BY MR. GESSER:**  
 18     **Q. If you take a look at pages, let's**  
 19     **say starting at page 8, Section A deals with**  
 20     **revenue and there's a table and then continuing**  
 21     **on there's a series of tables and calculations.**  
 22     This is a rebuttal report and I'm  
 23     curious, those tables that start at page 9, what  
 24     is this being put -- strike that.  
 25     **What are those tables rebutting?**

1                   **B. Black**  
 2       **prices?**  
 3       MR. FOX: Objection.  
 4       A. No.  
 5       **Q. So you haven't read the decisions if**  
 6       **I tell you a case, MetroMedia, Lantronix,**  
 7       **DeMarco, these cases don't mean anything to you?**  
 8       A. They don't ring a bell.  
 9       **Q. Okay. How about the academic**  
 10      **literature on the effects of analyst statements**  
 11      **on stock prices, Womack's article, things like**  
 12      **that.**  
 13      **Are you familiar with those?**  
 14      A. I'd say I have a general familiarity  
 15      with some of that literature, but I don't claim  
 16      to be closely familiar with it.  
 17      **Q. Okay. You wouldn't consider yourself**  
 18      **an expert on them.**  
 19      A. On that body of literature that  
 20      studies analysts in particular, no. I'm not a  
 21      particular expert in that area because I haven't  
 22      worked in that area.  
 23      **Q. Do you consider yourself an expert on**  
 24      **advertising?**  
 25      A. No.

Page 21

1                   **B. Black**  
 2       **What proposition that is being put forward in**  
 3       **defendants' expert report is that designed to**  
 4       **rebut?**  
 5       MR. FOX: Objection.  
 6       A. I think that I was initially engaged  
 7       as a rebuttal witness for Professor Dayton and  
 8       he has some general opinions about the  
 9       reasonableness of CSFB's published opinions  
 10      about AOL during the relevant time period.  
 11      And in addition, Professor Stulz has  
 12      some opinions about well, if you just play with  
 13      terminal multiples a little bit, you can get a  
 14      wide variation in predictive valuations.  
 15      So I think that this analysis is  
 16      meant to be responsive to those opinions.  
 17      **Q. So you understand Professor Dayton's**  
 18      **report to opine on the reasonableness of Credit**  
 19      **Suisse's analyst reports on AOL.**  
 20      A. In effect, yes, though not in  
 21      precisely those words I think.  
 22      **Q. I'm not sure I understand what you**  
 23      **mean by that.**  
 24      A. I'm trying to remember. I've got in  
 25      the report somewhere what his principal opinions

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Page 23

1                   B. Black  
 2 are. He doesn't directly say that he thinks the  
 3 CSFB opinions were reasonable.

4                   He says instead that it would be  
 5 reasonable to be more optimistic than Laura  
 6 Martin was about the Time Warner segments of  
 7 AOL. I think that was one of his opinions.

8                   **Q. Do you agree with that?**

9                   A. At that level of generality and  
 10 depending on the time frame, yeah, there was,  
 11 you know, there was for Time Warner or for AOL  
 12 or at various times some range of reasonable  
 13 opinions, and I have no doubt that one could be  
 14 more optimistic than Laura Martin was at  
 15 particular points in time and still be within  
 16 that range of reasonableness.

17                  **Q. Do those points in time include  
 18 January through September of 2001?**

19                  A. I think that I didn't ask myself that  
 20 question.

21                  Instead I asked were the CSFB reports  
 22 both reasonable and consistent with the apparent  
 23 opinions of Laura Martin and Jamie Kiggen.

24                  I didn't ask okay, if Laura Martin is  
 25 here, could you be here and be reasonable.

1                   B. Black  
 2 I said okay, where is CSFB and what  
 3 can I say about whether that was reasonable.

4                   **Q. So before issuing your rebuttal  
 5 report, you didn't even bother to determine  
 6 whether or not you agreed with the conclusion of  
 7 the report that you were rebutting?**

8                   MR. FOX: Objection.

9                   A. That isn't what I said. I think I  
 10 said that I -- that it's certainly the case that  
 11 sort of in general it might well be possible to  
 12 be more optimistic than Laura Martin was at  
 13 particular points in time.

14                  So I read Professor Dayton's opinion  
 15 and said at that level of generality, it's not  
 16 clear that I would have a basis for disputing  
 17 that opinion, but I also didn't treat it as the  
 18 job of my rebuttal report to say it would be  
 19 unreasonable for someone to be more optimistic  
 20 than Laura Martin at particular points in time.  
 21 I don't say that in my report.

22                  **Q. Okay.**

23                  MR. GESSER: Well, I'm going to mark  
 24 this as Dayton-2.

25                  MR. FOX: Black.

Page 24

Page 25

1                   B. Black  
 2 MR. GESSER: I'm sorry, Black 2.  
 3 (Defendants' Exhibit Black 2, Expert  
 4 report of Professor John Dayton, marked for  
 5 identification, as of this date.)

6 BY MR. GESSER:

7                  **Q. I'm showing you Exhibit Black-2,  
 8 which is the expert report of John Dayton.  
 9 I presume you've read this?**

10                 A. I have.

11                 **Q. Have you seen the deposition  
 12 transcript from the deposition of Professor  
 13 Dayton?**

14                 A. I have not. I believe the deposition  
 15 was taken only yesterday.

16                 **Q. I know. I was there.**

17                 **Have you seen the deposition  
 18 transcript?**

19                 A. I have not.

20                 **Q. Have you seen any of the deposition  
 21 transcripts of any of the experts in this case?**

22                 A. I have not.

23                 **Q. All right. If you look at paragraph  
 24 6 on page 2.**

25                 A. Okay. Yes.

1                   B. Black  
 2                   **Q. So these 6A and 6B are the two  
 3 questions that Professor Dayton was asked.**

4                   The first one, 6A, is: "Were the  
 5 kinds of concerns that Laura Martin expressed in  
 6 her internal emails about the advertising market  
 7 and its potential impact on AOL Time Warner..."  
 8 in brackets AOL "...between January and  
 9 September 2001 otherwise known to the public at  
 10 the time?"

11                  **Did you conduct any investigation to  
 12 determine the answer to that question?**

13                  A. I think that I would answer as  
 14 follows: That I do not disagree that the fact  
 15 that this was not a wonderful time for the  
 16 advertising market, this being 2001. I do not  
 17 disagree that there was general information  
 18 about troubles in the advertising market.

19                  I think a different question is  
 20 what -- you know, how deep was that concern, how  
 21 bad would the advertising market be and  
 22 certainly it was uncertain what the impact of a  
 23 weak or bad advertising market would be on AOL.

24                  But in terms of general knowledge  
 25 about weakness in the advertising market, I

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1                   B. Black  
 2 didn't -- you know, I've done whatever reading  
 3 I've done for this case but I didn't see any  
 4 reason to dispute a statement made at that level  
 5 of generality.

6           **Q. My question was did you conduct that inquiry.**

7           A. I did some amount of background  
 8 reading in order to understand the state of the  
 9 market for traditional advertising and online  
 10 advertising for this case.

11          I also have some familiarity from  
 12 work on the prior AOL securities case.

13          But I was not conducting a focused  
 14 investigation into what was generally known  
 15 about the advertising market because I didn't  
 16 need to do that for the opinions that I was  
 17 giving in this case.

18          **Q. Well, based on the limited inquiry that you did and your previous knowledge from other matters, did you form an opinion as to whether or not you had an answer to this question at 6A?**

19          MR. FOX: Objection. Asked and  
 20 answered.

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1                   **B. Black**  
 2 **inquiry into the subject leads you to believe that there wasn't -- it wasn't known to the market that the downturn in the, that the downturn in the advertising market could potentially impact AOL?**

3            MR. FOX: Objection.

4            A. No. I think that the extent to which  
 5 the general downturn in the advertising market  
 6 would affect AOL was not known, nor was the  
 7 severity of the downturn in the advertising  
 8 market necessarily known.

9          **Q. Well, let's take the first of those. How the advertising market would affect AOL was unknowable, wasn't it?**

10         MR. FOX: Objection.

11         A. No, it was estimatable and one might  
 12 think that it was the job of an analyst covering  
 13 AOL to estimate it.

14         **Q. And I'm so you're saying it wasn't estimated or it just wasn't estimated correctly?**

15         A. I didn't say either of those things.

16         I disagreed with your statement that  
 17 it was unknowable.

18         **Q. Okay. But now I'm asking you, are**

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1                   B. Black  
 2            A. At the level of generality that 6A is  
 3 phrased, I did not disagree that the kinds of  
 4 concerns at some level of severity that Laura  
 5 Martin had at that time were out there in the  
 6 public domain. It was known that there was a  
 7 weak advertising market during this period of  
 8 time.

9            I do not --

10         **Q. Was it also --**

11         A. -- think the opinions that were out  
 12 there were monolithic, people had different  
 13 views as to how bad the advertising would be and  
 14 I do not think that how -- that that general  
 15 information that was out there necessarily  
 16 included how that weak overall advertising  
 17 market would affect AOL in particular, nor do I  
 18 think that Professor -- that the evidence that  
 19 Professor Dayton recites goes to that narrower  
 20 question.

21          So I'm trying to distinguish between  
 22 general information about a general slowdown in  
 23 advertising and how that general slowdown would  
 24 affect AOL.

25         **Q. Just so I understand, your limited**

Page 29

1                   **B. Black**  
 2 **you saying that people just didn't do the analysis or they didn't do the analysis correctly as to whether the downturn in the advertising market would affect AOL?**

3            MR. FOX: Objection.

4            A. I don't know who these people are and  
 5 I don't think I'm saying either of those things.

6         **Q. Okay. So what are you saying?**

7            MR. FOX: Objection.

8            A. I don't understand the question.

9            I said A, you said are you saying B  
 10 or C and I said no.

11          And you're saying well, what you  
 12 saying and I'm going to come back and say I'm  
 13 saying A.

14         **Q. So say it.**

15           MR. FOX: Objection.

16           A. I, going back about three or four  
 17 questions, you said well, the impact of the  
 18 advertising slowdown on AOL was unknowable and I  
 19 said I don't agree with that. I think it was  
 20 estimatable and it was the job of securities  
 21 analysts to estimate.

22         **Q. Okay. So now I'm asking you, did, in**

1                   **B. Black**  
 2 **your view, securities analysts in this time**  
 3 **frame estimate the impact that the downturn in**  
 4 **advertising market would have on AOL?**

5       A. They certainly should have and my  
 6 review of information for this case suggests  
 7 that at least some of them did.

8       And I don't know that I can form an  
 9 opinion as to whether analysts in general did  
 10 because I did not try to read the universe of  
 11 analyst opinions about AOL at this time.

12      **Q. Okay. But some analysts did; is that**  
 13 **correct?**

14      A. Yes.

15      **Q. Did any of them do it correctly in**  
 16 **your view?**

17      MR. FOX: Objection.

18      A. I did not try to address that  
 19 question in my review.

20      **Q. Because that was not relevant to your**  
 21 **review?**

22      MR. FOX: Objection.

23      A. I was not in my review and my report  
 24 trying to address whether the 15 or 20 analysts,  
 25 however many analysts who covered AOL, were

1                   **B. Black**  
 2 either doing a good job or doing a job that was  
 3 consistent with their private beliefs.

4       I was trying to examine whether it  
 5 appeared that the CSFB public statements were  
 6 both internally consistent and reasonable and  
 7 consistent with the private beliefs of Laura  
 8 Martin and Jamie Kiggen.

9       I did not take myself to be forming  
 10 any opinions about the opinions of other  
 11 analysts or about the work that other analysts  
 12 did.

13      **Q. And you conclude that Mr. Kiggen and**  
 14 **Ms. Martin's public opinions about AOL in 2001**  
 15 **were unreasonable.**

16      MR. FOX: Objection.

17      A. What I try to do in the report is  
 18 point out pieces of those opinions that to me do  
 19 not appear to be reasonable or internally  
 20 consistent or consistent with their prior views.

21      I don't want to say that everything  
 22 they said was unreasonable. I want to say that  
 23 there's evidence that some of the things that  
 24 they said were not reasonable or were not  
 25 internally consistent or were... Let me stop

1                   **B. Black**  
 2 there.

3      **Q. Okay. Well, you're a law professor,**  
 4 **correct?**

5      A. Yes.

6      **Q. And you understand that there's a**  
 7 **legal dimension to the word "reasonable"; is**  
 8 **that correct?**

9      A. I was not trying to use the term  
 10 "reasonable" in any of the many meanings in  
 11 which it has in different areas of law.

12      I was trying to use it in, you know,  
 13 with its ordinary meaning.

14      **Q. And what do you take its ordinary**  
 15 **meaning to be?**

16      A. That in the area of forecasting the  
 17 performance of a firm, as in many other areas,  
 18 there's not an exact known right answer.

19      One is forecasting, one is  
 20 estimating, one is trying to form reasonable  
 21 judgments based on everything one knows and  
 22 there will be some range of reasonable outcomes  
 23 that a particular analyst could reach.

24      **Q. And in doing that analysis, you**  
 25 **didn't think it was helpful or useful to look at**

1                   **B. Black**  
 2 **what other analysts were saying at the same time**  
 3 **about the same metrics?**

4      MR. FOX: Objection.

5      A. I was generally aware of the views,  
 6 the consensus views, let me call them that, of  
 7 other analysts and of the specific views of a  
 8 few analysts, but I didn't view my job as being  
 9 to try to assess whether they did a reasonable  
 10 job and I did not have access to what their  
 11 private unpublished views might be in order to  
 12 assess whether what they were saying in public  
 13 was consistent with what they believed in  
 14 private.

15      **Q. But whether or not Ms. Martin's views**  
 16 **and Mr. Kiggen's views as expressed in the**  
 17 **research reports were reasonable, in your view**  
 18 **was that in any way informed by what other**  
 19 **analysts were saying at the time?**

20      MR. FOX: Objection.

21      A. Yes.

22      **Q. How? How did what other analysts say**  
 23 **at the time inform your view as to whether the**  
 24 **CSFB research reports were reasonable?**

25      A. I am generally aware that the -- that

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1                   B. Black  
 2 AOL had publicly announced its own guidance, as  
 3 they called it, that they would have revenue of  
 4 \$40 billion and EBITDA of \$11 billion for the  
 5 year 2001 as a whole, and that many analysts  
 6 were not disagreeing with that guidance and were  
 7 preparing forecasts that were consistent with  
 8 that guidance, especially in the first half of  
 9 2001.

10          **Q. Is that your answer to my question?**

11          A. Yes.

12          **Q. Okay. Then I'm going to ask it**  
 13 **again.**

14          **How did what other analysts say**  
 15 **inform your opinion as to whether or not Laura**  
 16 **Martin and Jamie Kiggen's views about AOL were**  
 17 **reasonable?**

18          MR. FOX: Objection.

19          A. I was looking at a situation where  
 20 the published views of Jamie Kiggen and Laura  
 21 Martin were within a range, for the most part,  
 22 where other analysts were also publishing views,  
 23 and that informed my judgment as to the  
 24 reasonableness or plausibility of their views  
 25 against some generic set of background beliefs

1                   B. Black  
 2 about the market, the advertising market, the  
 3 online advertising market, the non-online  
 4 advertising market and how developments in those  
 5 markets would affect AOL.

6          **Q. Okay. And nonetheless are there**  
 7 **instances where you found that a particular**  
 8 **metric that was put forward in the CSFB analyst**  
 9 **reports was unreasonable even though it was**  
 10 **below the consensus of other analysts who were**  
 11 **covering AOL at that time?**

12          A. I phrase that narrowly. I did not  
 13 ask that question. I was generally aware that  
 14 the numbers they were putting out in public were  
 15 within the range of what other analysts were  
 16 doing and also that they were trying to keep  
 17 them within that range.

18          For particular numbers at particular  
 19 times, I did not try to evaluate is this number  
 20 above or below the range of what other analysts  
 21 had in their reports at that time.

22          What I was trying to do in the tables  
 23 in my report was assess internal consistency and  
 24 consistency with the already known results for  
 25 AOL for prior periods and consistency with the

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1                   B. Black  
 2 private views of Laura Martin and Jamie Kiggen.

3          **Q. Okay. Can I -- let me try to break**  
 4 **that into piece because I think we're muddling**  
 5 **two different ideas here.**

6          **You have a view that certain metrics**  
 7 **that are in CSFB's analyst reports between**  
 8 **January 2001 and January 2002 were unreasonable.**

9          MR. FOX: Objection.

10 BY MR. GESSER:

11          **Q. Is that correct?**

12          A. Yes.

13          **Q. And assuming for a second, if you**  
 14 **can, that all of the internal emails and so**  
 15 **forth that you've reviewed about Jamie Kiggen**  
 16 **and Laura Martin's beliefs, assuming they did**  
 17 **not exist and now you're only looking at the**  
 18 **reports themselves, do you nonetheless believe**  
 19 **that some of the metrics that they put forward**  
 20 **were unreasonable or are all the basis, bases**  
 21 **for your belief that those were unreasonable**  
 22 **dependent on the existence of internal emails**  
 23 **that you've viewed between Laura Martin and**  
 24 **Jamie Kiggen and other analysts on that team?**

25          MR. FOX: Objection.

1                   B. Black  
 2 A. I believe that some of the numbers  
 3 that they had in the public domain were  
 4 unreasonable by reference to AOL's prior  
 5 numbers.

6          And I also believe that they did not  
 7 update or adjust their numbers in the way I  
 8 would think an analyst should as additional AOL  
 9 information came out.

10          And for purposes of my answer I am,  
 11 as you requested, putting aside the emails or  
 12 internal conversations.

13          **Q. Okay. So I'm going to refer to just**  
 14 **shorthand so I don't have to repeat that whole**  
 15 **thing, I'm going to refer to the instances in**  
 16 **which their numbers are unreasonable**  
 17 **irrespective of the internal back and forth, as**  
 18 **numbers that are objectively unreasonable and**  
 19 **numbers that are unreasonable by virtue of the**  
 20 **fact that they are, in your view, inconsistent**  
 21 **with the internal views as expressed in emails**  
 22 **among the analysts as subjectively unreasonable.**

23          **Is that a fair -- can I use those**  
 24 **terms?**

25          MR. FOX: Objection.

1                   B. Black  
 2       Mischaracterizes.  
 3       A. Let me suggest a slightly finer  
 4 division I would be happy with; that I think  
 5 there are going to be some numbers that are  
 6 unreasonable against the background of what we --  
 7 know about AOL's prior performance or what we --  
 8 what people believed about the state of the  
 9 markets.  
 10      There are going to be a second set  
 11 that are unreasonable in the sense that if you  
 12 believed A at time 1 and then the following new  
 13 information came out, you couldn't still believe  
 14 A at time 2 because the information on which you  
 15 were basing your opinion had changed. So maybe  
 16 if you believed something different than A at  
 17 time 1, a star, you could still believe A at  
 18 time 2.  
 19      **Q. I understand that distinction. That**  
 20 **distinction is meaningless for what I'm trying**  
 21 **to accomplish so let me give the distinction**  
 22 **that I care about.**  
 23      **The distinction I care about is**  
 24 **numbers that are unreasonable based on**  
 25 **information that was public and numbers that are**

1                   B. Black  
 2 **have this disagreement.**  
 3      **Is that fair?**  
 4      A. Let's go forward and I may want to  
 5 come back with my middle category of failure to  
 6 update. Let's call it that.  
 7      **Q. All right. For numbers that are**  
 8 **objectively unreasonable, which I think you**  
 9 **agree there are some --**  
 10     A. Yes.  
 11     **Q. -- did you then go on and take a look**  
 12 **at what other analysts were saying at the time**  
 13 **for those numbers to test whether or not those**  
 14 **numbers were consistent with what other analysts**  
 15 **in the market were saying?**  
 16     A. I did not specifically undertake that  
 17 work, no.  
 18     **Q. Okay. Don't you think that work**  
 19 **would be important in determining whether or not**  
 20 **those numbers were unreasonable?**  
 21     So if, for example, you viewed the  
 22 October -- well, take the April 10th CSFB EBITDA  
 23 numbers for AOL as objectively unreasonable but  
 24 then you went on and found that every other  
 25 analyst in the market had higher EBITDA numbers

1                   B. Black  
 2 **unreasonable based on information that only**  
 3 **Jamie Kiggen, Laura Martin and whoever else was**  
 4 **on those emails knew.**  
 5      **Do you understand that distinction?**  
 6      MR. FOX: Objection.  
 7      A. I do, but let's see where we go with  
 8 specific questions because what I'm calling the  
 9 intermediate category of failure to update or if  
 10 you believe A at time 1, you can't still believe  
 11 A at time 2, may still turn out to be important.  
 12      **Q. Well, to the extent that what you**  
 13 **believe at the time A or time 2 is dependent on**  
 14 **information that is only known among the**  
 15 **analysts at Credit Suisse, I would view that as**  
 16 **being subjective, and anything that no one could**  
 17 **believe because it's only based on public**  
 18 **information would be objective.**  
 19      MR. FOX: Objection.  
 20     A. Again, I want to suggest that --  
 21      **Q. I think this disagreement that we're**  
 22 **having is going to be the crux of some**  
 23 **questions, so why don't we stick with how I'm**  
 24 **defining it, and then once we get to the issue,**  
 25 **I think this will become clearer as to why we**

1                   B. Black  
 2 **for AOL, shouldn't that have informed your**  
 3 **opinion as to whether or not the CSFB EBITDA**  
 4 **numbers in the April 10th report were in fact**  
 5 **unreasonable?**  
 6      A. That feels like an incomplete  
 7 hypothetical and I think my answer would be  
 8 let's look at particular numbers at particular  
 9 times and then first of all, it may or may not  
 10 be factually the case that other analysts had  
 11 similar numbers --  
 12      **Q. But you don't know that.**  
 13     A. -- at similar times.  
 14     At that level of detail number,  
 15 number by number, I do not know that.  
 16 That's correct.  
 17      **Q. So it's possible that you've**  
 18 **identified a number, a metric by Credit Suisse**  
 19 **that you view as being objectively unreasonable**  
 20 **that nonetheless is lower than a number that**  
 21 **many other analysts at the time had for AOL.**  
 22      MR. FOX: Objection.  
 23     A. That is certainly theoretically  
 24 possible since I didn't review all of the other  
 25 analyst opinions.

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1                   B. Black  
 2                 And whether it's true in fact, I do  
 3                 not know.  
**4                 Q. Based on your review of the analyst**  
**5                 reports in this case, do you have a view as to**  
**6                 whether you are a better analyst for media**  
**7                 companies than Jamie Kiggen?**

8                 MR. FOX: Objection.

9                 A. I did not view Jamie Kiggen as being  
 10                a media analyst. I viewed him as being an  
 11                Internet analyst.

12                **Q. Okay. Do you view yourself as a**  
**13                better Internet analyst than Jamie Kiggen?**

14                A. I don't have an opinion on that  
 15                question.

16                **Q. Do you view yourself as a better**  
**17                media/Internet analyst than Mary Meeker?**

18                A. I am generally aware that Mary Meeker  
 19                is a, or was at the time, a highly respected  
 20                Internet analyst and beyond that I have no  
 21                opinion on that question.

22                **Q. So you may be a better analyst than**  
**23                she is.**

24                MR. FOX: Objection.

25                A. First of all, I am not --

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1                   B. Black  
 2                 want to offer any opinion on how good an analyst  
 3                 Mary Meeker was other than to say that she was  
 4                 highly regarded by investors at that time.

5                 **Q. Okay. I mean I can go through a**  
**6                 whole long list of analysts who covered AOL at**  
**7                 the time. I assume your answer is going to be**  
**8                 the same for everyone, but I'm just going to go**  
**9                 through them; Richard Bilotti, Mary Meeker,**  
**10                Jessica Reef Cone, Holly Becker, Lanny Baker,**  
**11                all analysts who covered AOL at the time.**

12                **You have no view one way or the other**  
**13                as to whether you are a better analyst of AOL**  
**14                than they are?**

15                A. Well, again, I am generally  
 16                knowledgeable in corporate finance but I'm not a  
 17                securities analyst so it feels like a weird  
 18                question to say I'm better than they are at  
 19                their business. I would not claim to be better  
 20                than they are at their business.

21                I would claim to be capable of doing  
 22                financial analysis and recognizing, you know,  
 23                whether numbers add up consistently, whether  
 24                trends make sense and so on, and there are  
 25                instances in at least the CSFB reports where I

1                   B. Black  
 2                 MR. FOX: He said he has no opinion.  
 3                 MR. GESSER: So I am now asking him  
 4                 is it possible that he is a better analyst  
 5                 than Mary Meeker.

6                 MR. FOX: I don't understand.  
 7                 Objection.

8                 A. Here's a more complicated answer,  
 9                 okay?

10                With respect to -- at one level I am  
 11                not a securities analyst and there is certainly  
 12                much about the business of securities analysis  
 13                that I do not know. I know corporate finance in  
 14                general, but I am not a securities analyst in  
 15                particular.

16                On the other hand, I would suspect  
 17                that if I were to sit down and undertake the job  
 18                of analyzing a company, I would not develop  
 19                numbers that I thought were internally  
 20                unreasonable and there are at least some  
 21                instances in which I believe that the CSFB  
 22                reports were so.

23                I have no basis for having a view as  
 24                to whether there were similar unreasonablenesses  
 25                in the opinions of other analysts so I don't

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1                   B. Black  
 2                 believe it was not the case that the trends made  
 3                 sense to me. It is possible that I would find  
 4                 similar issues in the reports of other analysts  
 5                 and I have not done that work.

6                 **Q. Okay. And the work that you did with**  
**7                 respect to the Credit Suisse analysts, you did**  
**8                 that, analyst reports on AOL, you did that in**  
**9                 the last two months; is that correct, three**  
**10                months?**

11                A. Yes.

12                **Q. So you did it after the fact.**

13                MR. FOX: Objection.

14                A. That is correct.

15                **Q. So you're analyzing trends knowing**  
**16                how those trends turned out; is that correct?**

17                A. I believe that I tried to be  
 18                careful --

19                **Q. That's not my question.**

20                **My question is --**

21                MR. FOX: Let him finish his answer.  
 22                He was in the middle of an answer.

23                MR. GESSER: A nonresponsive answer,  
 24                but yes.

25                MR. FOX: Let the witness please

1           B. Black  
 2        finish his answer.  
 3        A. In offering a view as to, for  
 4 example, the reasonableness of the implicit  
 5 fourth quarter revenue of America Online that is  
 6 implicit in the Fidelity presentation which is  
 7 one of the pieces of my report, I did not use  
 8 information about what the fourth quarter  
 9 revenue turned out to be. I used information  
 10 that was available at the time, which was  
 11 information through the third quarter.

12       Similarly, in reviewing, analyzing,  
 13 if you like, the public April 10th forecast and  
 14 model for AOL that was published by CSFB, I took  
 15 into account information through the fourth  
 16 quarter of 2000 but I did not take into account  
 17 information about the first quarter of 2001  
 18 which was at that time not yet available.

19       So I tried to be careful in not using  
 20 knowledge about what the future would turn out  
 21 to be in assessing whether particular numbers at  
 22 particular times were reasonable when made.

23       **Q. We're going to have a long day and  
 24 your answers, you have a sort of a slow way of  
 25 answering questions and so if we're going to get**

1           **B. Black**  
 2        **through all the questions, it will be helpful if  
 3 you just listen to my question and give me the  
 4 answer, okay? So let me just ask this again,  
 5 okay?**  
 6        **The trends that you were looking at,  
 7 so the growth in AOL, AOL stock price, how the  
 8 advertising market was going, all those things,  
 9 those are now known to you what actually  
 10 happened; is that correct?**

11       MR. FOX: Objection.

12       A. In some cases yes, although not in  
 13 all because I wasn't trying to say  
 14 systematically what happened to A, B or C in the  
 15 future because my opinion was about what was  
 16 reasonable at the time. So they are knowable  
 17 but they are not necessarily known to me.

18       **Q. But you did work for AOL previous to  
 19 this case, work related to AOL previous to this  
 20 case; is that right?**

21       A. Yes.

22       **Q. And through that work you know  
 23 generally how AOL performed in 2003, 2004, 2005,  
 24 its stock price performed?**

25       MR. FOX: Objection.

1           B. Black  
 2        A. Yes, but certainly not at the level  
 3 of particular numbers and particular quarters in  
 4 nature of my report here.

5        It's also the case that my prior  
 6 report was really focused on America Online  
 7 rather than on AOL as a whole.

8       **Q. I understand that, but getting to my,  
 9 back to the original question, which was you're  
 10 conducting this analysis that you're doing of  
 11 AOL with the benefit of some hindsight; is that  
 12 correct?**

13       MR. FOX: Objection.

14       A. I want to return to my prior answer  
 15 which is I was trying not to review or analyze  
 16 the public statements by CSFB with the benefit  
 17 of hindsight even though that hindsight was  
 18 potentially available.

19       **Q. That's sort of a difficult task,  
 20 though, isn't it, to keep what you know about  
 21 what happened --**

22       **(Witness' cell phone ringing.)**

23       **Q. Do you want to take that?**

24       A. No. I'm turning my phone off.

25       **Q. To keep what you know about what**

1           **B. Black**  
 2        **happened to AOL separate in your mind when  
 3 you're doing this analysis.**

4        **Is that a difficult task to do?**

5        A. I think it's a plausible task.

6        There is certainly some risk of  
 7 allowing what can be called hindsight bias to  
 8 influence your opinions, and I was attentive to  
 9 that risk and tried not to introduce, directly  
 10 or indirectly, knowledge of the future into  
 11 opinions to speak as of a particular point in  
 12 time.

13       It's certainly possible that I was  
 14 not completely successful in that effort, but  
 15 that's what I was trying to do.

16       **Q. As you sit here today, is there  
 17 anything that you'd like to change in your  
 18 report?**

19       A. I think that we did a fair amount of  
 20 editing and mostly trimming over the last few  
 21 days before the deadline and as a result, I read  
 22 the report and say God, you know, this needs  
 23 another draft.

24       I think there are two tables that are  
 25 virtually identical, for example, and so I might

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1                   **B. Black**  
 2 want to go back and just sort of reread for flow  
 3 and clarity.

4                   I don't think there are opinions that  
 5 I state in the report that I today consider to  
 6 be inaccurate.

7           **Q. How about any of the numbers? Do you**  
 8 **consider the numbers to be inaccurate?**

9           A. No.

10          **Q. But you may after today go back and**  
 11 **read it and make some stylistic changes? Is**  
 12 **that what you're saying?**

13          MR. FOX: Objection.

14          A. No. That if I had the opportunity to  
 15 have had some extra time, I would have reread  
 16 it, marked it up, edited it at the level of  
 17 style and flow.

18          **Q. This report is dated the 17th of**  
 19 **July; is that right?**

20          A. I don't recall.

21          **Q. I'm representing to you that it's**  
 22 **dated the 17th of July.**

23          So you haven't had time in the last  
 24 month to go over this and just see if there are  
 25 any changes you want to make?

1                   **B. Black**  
 2                   A. I read it yesterday and I am  
 3 comfortable with the opinions in the report.  
 4                   I am not happy with flow and  
 5 smoothness and with the fact that there are two  
 6 duplicative tables.

7           **Q. Leaving that aside, there's nothing**  
 8 **as you sit here today that you think needs to be**  
 9 **changed in order for it to be accurate and**  
 10 **accurately reflect your views; is that right?**

11          A. Yes.

12          **Q. We've gone on a fairly long, tangent**  
 13 **but where we were at before we got off was we**  
 14 **were in Exhibit 2, which is Professor's Dayton's**  
 15 **report, and we were looking at the assignment**  
 16 **that Professor Dayton was asked, and we were on**  
 17 **6A and I never got to 6B so I wanted to get back**  
 18 **to that.**

19          The question -- the second question  
 20 that Professor Dayton was asked was, was it  
 21 reasonable for someone knowledgeable about the  
 22 advertising market and AOL between January and  
 23 September of 2001 to have understood the kinds  
 24 of concerns raised by Ms. Martin but have  
 25 reached more optimistic conclusion regarding

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1                   **B. Black**  
 2 AOL's prospect than Ms. Martin appears to have  
 3 reached.

4           **Did you conduct that inquiry?**

5          A. Once again, at that level of  
 6 generality, was it reasonable for someone  
 7 knowledgeable about the advertising market and  
 8 AOL to have generally understood Ms. Martin's  
 9 concerns but reached a more optimistic  
 10 conclusion, I had no basis, no reason to  
 11 disagree with that opinion.

12          I thought that that wasn't a terribly  
 13 sensible question to ask and I instead wanted to  
 14 ask the more specific questions for particular  
 15 statements at particular times; were they  
 16 reasonable in light of known information about  
 17 AOL, which you've asked me to call objective  
 18 reasonableness, were they subjectively  
 19 reasonable and were they appropriately updated.

20          And those were the questions that I  
 21 thought it was appropriate to ask and the  
 22 questions that I attempted to address in my  
 23 opinion.

24          **Q. Okay. But you don't -- as they are**  
 25 **phrased here, leaving aside what questions you**

1                   **B. Black**  
 2 thought were the appropriate questions, but as  
 3 they are phrased here, you don't have any issue  
 4 with either 6A or 6B as answered by Professor  
 5 Dayton in his report at this level of  
 6 generality; is that correct?

7          MR. FOX: Objection.

8          A. No.

9          **Q. Okay. So you're not rebutting his**  
 10 **answer to these questions in your report, you**  
 11 **are formulating what you think is the more**  
 12 **appropriate question to be asking to get at what**  
 13 **you think is the heart of the issue and then**  
 14 **going ahead and answering it; is that accurate?**

15          MR. FOX: Objection.

16          A. I am attempting in my report to  
 17 explain why the questions that he poses for  
 18 himself or that you posed for him are framed too  
 19 broadly and too generally, and describing what I  
 20 think more appropriate questions might be and  
 21 attempting to answer those questions.

22          **Q. Did you form any opinions about**  
 23 **Credit Suisse's analyst reports on AOL that are**  
 24 **not reflected in your report?**

25          MR. FOX: Objection.

1                   B. Black  
 2       A. Yes.

3       **Q. What are those?**

4       A. First, I think a judgment was made as  
 5 to what level of numerical detail to include in  
 6 the report and, you know, a draft report had  
 7 additional numbers and additional details.

8                   And so I have opinions about  
 9 additional numbers and additional details that  
 10 are consistent with the opinions that are in the  
 11 report but are not specifically in the report.

12     **Q. And why didn't you include those in  
 13 the report?**

14     MR. FOX: Objection.

15     I think that you're -- just so it's  
 16 clear, as you know, we have a stipulation  
 17 about drafts in this case and I think  
 18 you're starting to get very close to why  
 19 things are and aren't in --

20     MR. GESSER: Fair enough. I  
 21 understand.

22 BY MR. GESSER:

23     **Q. So the additional opinions that  
 24 aren't reflected in your report, if you were to  
 25 testify at trial, you would -- would you be**

1                   **B. Black**  
 2       **opining on those additional opinions or would  
 3 you be sticking to what is in your report?**

4       A. I don't know and let me explain why I  
 5 don't know.

6                   So I have in the report an opinion  
 7 that, for example, Table 1 on page 9 and the  
 8 related text where I say in effect, gee, the  
 9 bubble burst in March of 2000. AOL's America  
 10 Online's growth after the bubble burst was in  
 11 the three to four percent per quarter range  
 12 revenue growth here and given that, it was not  
 13 reasonable and not plausible to project that  
 14 they suddenly bounced up to 19 percent growth in  
 15 the fourth quarter of 2000.

16                   Behind that I have a further analysis  
 17 of AOL's revenue basically comes from two  
 18 sources; subscriptions and advertising. There's  
 19 a little bit left over, but not much. So I  
 20 looked specifically at the, let me call it the  
 21 sub-projections for subscriptions, subscription  
 22 revenue and for advertising and e-commerce  
 23 revenue to assess the reasonableness of those  
 24 individual sub-numbers.

25                   And I would think it appropriate as

1                   B. Black  
 2 part of the basis for my overall opinion that  
 3 the 19 percent growth projection, implicit  
 4 projection, is unreasonable to also discuss the  
 5 sub-numbers that are components of that overall  
 6 number.

7     **Q. And so sticking on this 19 percent  
 8 growth rate, you characterized that growth rate  
 9 as absurd; is that right?**

10     A. I don't recall the exact term that I  
 11 used.

12     **Q. Take a look at on page 9, first full  
 13 paragraph, last sentence.**

14     A. I see the word "absurd."

15     **Q. Okay. So --**

16     A. I characterized an estimate of 19  
 17 percent quarter-over-quarter growth against the  
 18 background of 3.9 percent and 3.2 percent in the  
 19 preceding two quarters and a weak overall  
 20 economy as, quote, absurd, close quote.

21     **Q. Did you take a look at what other  
 22 analysts' quarter-over-quarter growth rate were?**

23     A. I did not.

24     **Q. So it's possible that other analysts'  
 25 growth rates were absurd as well.**

1                   **B. Black**

2       A. It's possible.

3     **Q. Okay. What would be a reasonable  
 4 quarter-over-quarter growth rate?**

5     MR. FOX: Objection.

6       A. I didn't try to precisely define a  
 7 range of reasonableness. I suppose that I could  
 8 attempt to do that.

9                   I just said hey, 19 percent ain't it  
 10 and it isn't close to being it, and I didn't try  
 11 to decide well, okay, 3 percent is clearly  
 12 reasonable given what they've done in the past 2  
 13 quarters, 4 percent is clearly reasonable. If  
 14 we start to go 5 percent, 6 percent, 7 percent,  
 15 at what point do I say that's unreasonable, at  
 16 what point do I say that's absurd. I didn't try  
 17 to form an opinion to that level of precision.

18     **Q. Because you didn't need to because in  
 19 your view, 19 percent is clearly absurd.**

20     A. I think that 19 percent was well  
 21 outside a range of reasonable fourth quarter  
 22 2000 revenue estimates for America Online.

23     **Q. Was your view of the reasonableness  
 24 of other metrics informed in any way by the  
 25 absurdity of this metric?**

**B. Black**

1       **So, for example, did you look at**  
 2       **them, each one individually and objectively, or**  
 3       **did the fact that this number was so absurd, did**  
 4       **that in any way influence your thinking that**  
 5       **well, if he's got this, in your view, crazy**  
 6       **number here, you know, that makes this number**  
 7       **more crazy or that -- I mean or that makes me**  
 8       **think that he's willing to use crazy numbers,**  
 9       **I'm going to look here?**

10      **Do you understand my point?**

11      **Was this sort of a holistic analysis**  
 12      **or did you actually just go metric by metric and**  
 13      **evaluate them individually without having any**  
 14      **regard to how other metrics played through your**  
 15      **analysis?**

16      MR. FOX: Objection.

17      A. I mostly tried to go metric by metric  
 18      but I also I think tried to have in the  
 19      background, look, I think it's nuts to think  
 20      that fourth quarter revenue is going to jump by  
 21      19 percent relative to the third quarter, but if  
 22      it does, they're going to do real well on EBITDA  
 23      too.

24      **Q. So to some extent there is an**

**B. Black**

1       **overlap. This number does in some way impact on**  
 2       **other analyses that you were doing.**

3       A. Yes. You'd have to sort of look at  
 4       particular numbers and particular analyses to  
 5       have a more, a more fine grained answer, but I  
 6       think it's inevitable in trying to understand  
 7       the financial prospects of a company that the  
 8       numbers relate to each other.

9       **Q. And let me understand, if I can, what**  
 10      **goes into your analysis of why 19 percent**  
 11      **quarter-over-quarter growth rate was absurd.**

12      **First of all, do you have any sense**  
 13      **of when the Internet bubble burst in terms of**  
 14      **the sharp downturn in Internet-based stocks?**

15      A. I think most people would date that  
 16      to March of 2000.

17      **Q. Okay. So sometime in the first**  
 18      **quarter of 2000; is that right?**

19      A. Late in the first quarter of 2000.  
 20      So in terms of impact on financial outcomes, one  
 21      would not -- the first quarter was sort of, I  
 22      would date as being basically within the bubble  
 23      period and, you know, by the second quarter  
 24      we're probably coming out of it and certainly by

**B. Black**

1       **the third quarter we're out of it.**

2       **Q. So you've got, if you're looking at**  
 3       **Table 1 on page 9, you've got two quarters of**  
 4       **post bubble revenue numbers for AOL; is that**  
 5       **right?**

6       A. That's correct.

7       **Q. If you go back to the first quarter**  
 8       **of 2000, the numbers are significantly higher.**  
 9       **You've got 12.1 percent quarter-over-quarter**  
 10      **growth and 10.6 quarter-over-quarter growth.**

11      **Does the fact that you're only**  
 12      **looking at two quarters right after the Internet**  
 13      **bubble burst, does that in any way suggest to**  
 14      **you that maybe those numbers are unusually low**  
 15      **and that there may be a rebound in the fourth**  
 16      **quarter of 2000?**

17      A. Here's what I think I would say. I'm  
 18      sort of trying to say okay, imagine I'm sitting  
 19      in January of 2001. At this point it's  
 20      reasonably clear that a whole lot of Internet  
 21      stocks are going down, companies are failing,  
 22      running out of money, we all know that.

23      It is likely that AOL will also be  
 24      affected by those trends and that would be part

**B. Black**

1       **of why I would think it would be appropriate to**  
 2       **ask whether the pre-bubble quarter-over-quarter**  
 3       **growth rates were still an appropriate basis for**  
 4       **projecting future growth.**

5       Now you've only got two post bubble  
 6       quarters. They're substantially lower than the  
 7       pre-bubble period and therefore your degree  
 8       of -- because you've only got two of them, your  
 9       degree of confidence that there's something  
 10      dramatically different about the post-bubble  
 11      period would be lower than it would otherwise be  
 12      if you had a longer time period.

13      On the other hand, it's not the case  
 14      that one was seeing 19 percent  
 15      quarter-over-quarter growth in the middle of the  
 16      bubble. One was seeing at the most, you know,  
 17      10.6 percent and 12 percent.

18      So I think your line of analysis is  
 19      sensible and would go to what the range of  
 20      reasonableness was for a projection for the  
 21      fourth quarter and, you know, if you had four or  
 22      five quarters of post-bubble period, you have  
 23      more confidence in what's a reasonable range  
 24      than if you had only two.

1                   B. Black

2   **Q. But your view is 19 percent is**  
 3   **unreasonable in part because it's even more than**  
 4   **the biggest quarter-over-quarter growth that you**  
 5   **had before the tech bubble burst.**

6   A. Yes.

7        MR. FOX: Objection.

8   A. And indeed, although I didn't include  
 9   that data in this table, I went further back  
 10   into 1999 in my, in my own work to try to see if  
 11   there were similar growth rates earlier in 1999.

12      Before that I basically started my  
 13 analysis at the beginning of 1999.

14   **Q. Did you, in going back and looking at**  
 15   **those numbers, did you notice any trends in**  
 16   **terms of where the biggest quarter-over-quarter**  
 17   **growth occurs as among the four quarters for any**  
 18   **particular year?**

19   A. It was my judgment that America  
 20 Online was not strongly seasonal so that the  
 21 quarter-over-quarter growth analysis was  
 22 appropriate.

23      Time Warner on the other hand is  
 24 strongly seasonal so the fourth quarter is a  
 25 large quarter for Time Warner. So I think a

1                   B. Black

2   quarter-over-quarter growth analysis for Time  
 3 Warner would be less appropriate and you might  
 4 have to be looking at this quarter versus the  
 5 same quarter a year earlier to get a better  
 6 sense of what likely growth would be.

7   **Q. But for the combined entity, did you**  
 8   **see any trends that would suggest to you that**  
 9   **the fourth quarter, quarter-over-quarter growth**  
 10   **was typically higher than the other**  
 11   **quarter-over-quarter growths for any particular**  
 12   **year?**

13   A. For the combined entity, given that  
 14 Time Warner was seasonal and had a strong fourth  
 15 quarter and to a lesser extent a strong second  
 16 quarter, then -- and if AOL was not strongly  
 17 seasonal, then necessarily the combined company  
 18 would be seasonal, though on a fractional basis  
 19 less so than Time Warner by itself.

20   **Q. And when you say "seasonal," you're**  
 21   **acknowledging that that would result in a higher**  
 22   **expected fourth quarter, quarter-over-quarter**  
 23   **growth than you would see in the other three**  
 24   **quarters for any particular year?**

25   A. That's correct. Table 1 is about

1                   B. Black

2 AOL, America Online, excuse me, using your  
 3 terminology, it's not about the combined  
 4 company.

5   **Q. Okay. And you saw no trend for the**  
 6   **fourth quarter for the America Online division.**

7   A. I did not see significant seasonality  
 8 if I recall. Maybe the fourth quarter tended to  
 9 be a little bit better I think because people  
 10 bought AOL subscriptions as Christmas presents,  
 11 but not -- but this was not a strong trend and  
 12 not enough so that I thought the  
 13 quarter-over-quarter analysis was inappropriate.

14   **Q. Okay. Let me just looking at this**  
 15 **chart, first quarter '99 was almost twice as**  
 16 **much as third quarter '99. Fourth quarter 2000**  
 17 **turned out to be almost twice as much as third**  
 18 **quarter.**

19      **You don't see that as being a trend**  
 20 **in any way?**

21   A. At the time, the question one would  
 22 have asked was was there evidence of strong  
 23 seasonality in past AOL results, and I don't  
 24 recall seeing that but I'm not carrying my  
 25 spreadsheet in my head.

1                   B. Black

2   **Q. Okay. But just the table that you've**  
 3 **got in front of you, just the two data points**  
 4 **that you've got, would suggest that fourth**  
 5 **quarter was on average, I don't know it's not**  
 6 **quite twice as much, but let's say it's 90**  
 7 **percent higher than third quarter?**

8        MR. FOX: Objection.

9   A. One would want to break that down.  
 10 Again, one would want to have more information  
 11 such as the first quarter of 1998 versus the  
 12 third quarter of 1998. One would want to break  
 13 that down into advertising revenue versus  
 14 subscription revenue.

15      And I tried, as I suggested in an  
 16 earlier answer, to do the analysis at that finer  
 17 level and found some fourth quarter seasonality,  
 18 but again, not enough so that I thought the  
 19 quarter-over-quarter analysis was inappropriate.

20      In contrast for the time Time Warner  
 21 side, I would think that a pure  
 22 quarter-over-quarter analysis would not be  
 23 appropriate because of much more significant  
 24 fourth quarter seasonality and to a lesser  
 25 extent, second quarter seasonality.

1                   B. Black

2   **Q. But you don't have the '98 numbers in**  
 3   **front of you, right?**

4    A. I don't have them --

5   **Q. Do you know what they are?**

6    A. I have them in a spreadsheet. I  
 7   don't know what they are.

8   **Q. Okay. Let's just look at the numbers**  
 9   **we've got in front of us. I've given you a**  
 10   **calculator if you need a calculator to be able**  
   **to do this.**

12   **But what is the percent increase in**  
 13   **quarter-over-quarter growth between the third**  
   **quarter of 1999 and the fourth quarter of 1999**  
   **for AOL according to your chart?**

16   A. I'm sorry. I'm not sure what  
 17   question you're asking, but the chart clearly  
 18   speaks for itself.

19   **Q. Well, I'm asking you what's the**  
 20   **difference between a 5.7 third quarter '99**  
   **quarter-over-quarter growth and a 10.6 percent**  
   **fourth quarter '99 quarter-over-quarter growth?**

23   MR. FOX: Objection.

24   A. Algebraically, the  
 25   quarter-over-quarter percentage growth was 5.7

1                   B. Black

2   you.

3   **Q. Okay. Which means that the**  
 4   **quarter-over-quarter growth between the third**  
   **quarter of '99 and the fourth quarter '99**  
   **represents an 86 percent increase in the**  
   **quarter-over-quarter growth; is that right?**

8   A. I don't think about it that way. I  
 9   think about it as a 4.9 percent difference and I  
 10   would also observe that as I look at these  
 11   numbers, the first quarter of 2000 is,  
 12   quarter-over-quarter growth rate is higher than  
 13   the fourth quarter of 1999. That's not the  
 14   pattern that you would expect if there was  
 15   strong fourth quarter seasonality and is part of  
 16   why I did not see strong overall seasonality in  
 17   the America Online numbers that I reviewed.

18   **Q. Well, that doesn't necessarily not**  
 19   **indicate strong seasonality, it may indicate**  
   **both strong seasonality and strong overall**  
   **growth; is that right?**

22   MR. FOX: Objection.

23   A. I'm trying -- so what you expect if  
 24   you have strong seasonality would typically be  
 25   let's say the fourth quarter is going to be a

1                   B. Black

2   percent for the third quarter of '99 versus the  
 3   second quarter, 10.6 percent for the fourth  
 4   quarter versus the third quarter, and then 12.1  
 5   percent for the first quarter of 2000 versus the  
 6   fourth quarter of 1999.

7   **Q. All right. I understand that.**

8   **And I'm asking you what is the**  
 9   **increase percentage quarter-over-quarter growth**  
 10   **between the third quarter '99 and the fourth**  
   **quarter '99?**

12   A. From the third -- the change in the  
 13   quarter-over-quarter, quarter-over-quarter  
 14   growth rate is plus 4.9 percent for the fourth  
 15   quarter versus the third quarter, and plus 1.5  
 16   percent for the first quarter of 2000 versus the  
 17   fourth quarter of 1999.

18   **Q. That's not what I'm asking.**

19   **I'm asking what is the percent**  
 20   **increase of the quarter-over-quarter growth from**  
   **fourth quarter '99 over third quarter '99?**

22   So I mean I can just tell you what  
 23   the math is. If you divide 10.6 divided by 5.7,  
 24   right, you're going to get 1.8 6?

25   A. If you tell me that, I'll believe

1                   B. Black

2   strong quarter. Almost necessarily then the  
 3   first quarter is going to be weak relative to  
 4   the fourth quarter against the background of  
 5   whatever underlying long-term growth trend there  
 6   might be.

7   So if I had a, you know, longer  
 8   series of data, I could try to estimate sort of  
 9   what's the year-over-year growth trend at a  
 10   particular point in time and does it look as if  
 11   the fourth quarter is significantly above trend  
 12   over a period of years.

13   Based on this data, again, looking  
 14   at -- the fourth quarter you black out because  
 15   don't know, it hasn't happened yet. You're  
 16   projecting it.

17   Looking at the other five quarters  
 18   and based on my best recollection of the further  
 19   past history of AOL, I did not see strong  
 20   seasonality in their quarterly results and I  
 21   think that the five existing quarters that are  
 22   here are consistent with the absence of strong  
 23   seasonality.

24   **Q. But you have the fourth quarter of**  
 25   **2000. You know what that number is.**

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**B. Black**

1 A. I didn't -- no. For purposes of  
 2 doing this analysis, right, you don't have that  
 3 number. It hasn't -- doesn't exist yet.

4 This analysis is in effect asking  
 5 whether in January of 2001 before the fourth  
 6 quarter of 2000 is out, is 19 percent  
 7 quarter-over-quarter growth reasonable.

8 I don't know the fourth quarter of  
 9 2000 for purposes of that analysis. I know the  
 10 fourth quarter of '99, I know the fourth '98, but  
 11 I don't know the fourth quarter of 2000 yet.

12 **Q. I'm asking a different question  
 13 though.**

14 **I'm asking you, is it reasonable to  
 15 assume that the fourth quarter for AOL would be  
 16 higher than the other quarters. For that  
 17 analysis, we have the number, we know what the  
 18 number is, and I'm saying that the only data  
 19 points we have for this chart that you give us  
 20 has in both instances a fourth quarter,  
 21 quarter-over-quarter growth rate that is in the  
 22 sort of 85 percent range higher than the  
 23 previous quarter, the third quarter,  
 24 quarter-over-quarter growth range.**

**B. Black**

1 **And I'm asking you it seems odd to me  
 2 that that is what I see on this data and yet you  
 3 conclude there's no seasonality, there's no  
 4 ex -- there would be no expectation that the  
 5 fourth quarter growth rate would be  
 6 significantly higher than the previous quarter.**

7 MR. FOX: Objection.

8 A. I do not recall from my review of  
 9 earlier numbers finding strong evidence of  
 10 seasonality, and therefore I concluded that the  
 11 quarter-over-quarter growth rates were  
 12 reasonable to present in this analysis.

13 **Q. Okay.**

14 MR. FOX: Is it time for a break?

15 MR. GESSER: If you want to take a  
 16 break, we can take a break.

17 MR. FOX: We've been going on for an  
 18 hour-and-a-half.

19 MR. GESSER: Okay. That's fine.

20 THE WITNESS: Let me ask in terms of  
 21 our overall structure --

22 MR. GESSER: Sure.

23 MR. FOX: Are we on the record or off  
 24 the record?

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**B. Black**

1 MR. GESSER: Off the record.

2 THE VIDEOGRAPHER: We're now going  
 3 off the record. The time is 11:03 a.m.

4 (Recess is taken.)

5 THE VIDEOGRAPHER: We are back on the  
 6 record. The time is 11:21 a.m.

7 This is the beginning of the tape  
 8 labeled No. 2.

9 BY MR. GESSER:

10 **Q. Professor Black, I'm going to ask you  
 11 to turn to page 19 of your report.**

12 A. Okay.

13 **Q. If you look at the last full sentence  
 14 on that page it says, "The largest driver of  
 15 value with the AOL division and within AOL, ads  
 16 were the principal driver of growth accounted  
 17 for most of its profit and for the lion's share  
 18 of its market share."**

19 **Do you agree with that sentence?**

20 A. Let me restate it since you misread  
 21 it slightly. So it says, "The largest driver of  
 22 value with the AOL division..." by which we mean  
 23 the America Online division "...and within  
 24 AOL..." by which we mean the America Online

**B. Black**

1 division "...ads were the principal driver of  
 2 growth, accounted for most of its profit, and  
 3 for the lion's share of its market value."

4 **Q. And you agree with that sentiment?**

5 A. Yes.

6 **Q. And what time period are you talking  
 7 about there?**

8 A. This would have been during the time  
 9 period that was relevant to my report, which is  
 10 I would say here the period of 2000 and 2001.

11 **Q. And for the period of '97, '98, '99**

12 **before the merger, leaving aside obviously the  
 13 first part of that sentence wouldn't make sense,  
 14 but would the second part of that sentence make  
 15 sense during that time period, that ads were the  
 16 principal driver of growth for America Online  
 17 and accounted for most of America Online's  
 18 profits and the lion's share of its market  
 19 value?**

20 MR. FOX: Objection.

21 I guess here you're talking about  
 22 pre-merger AOL.

23 MR. GESSER: Yes, just the America  
 24 Online company.

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1                   B. Black  
 2       A. Here's what I recall: So America  
 3   Online had extremely rapid growth in advertising  
 4   and commerce revenue from a quite low base  
 5   during the period of '97, '98, '99 and 2000.

6                   So by '99 and 2000 I think it's fair  
 7   to say that ads were the principal driver of  
 8   growth and accounted for most of the profit.

9                   I don't know that I would want to  
 10   make that statement earlier because ads were a  
 11   smaller part, a substantially smaller part of  
 12   the overall AOL business.

13                  So let me limit that statement to,  
 14   you know, the period of 2000 and 2001 when I  
 15   think it's accurate.

16                  Q. So for 1990 -- let's take 1998, this  
 17   statement as it relates only to the America  
 18   Online division that ads were the principal  
 19   driver of growth, is that --

20                  A. I would view as it becoming more and  
 21   more important during the period of '97, '98 and  
 22   '99, and at some point I'd be willing to say  
 23   they were the principal driver of growth but I'd  
 24   actually have to look at the numbers to have a  
 25   firm view on when that would be.

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1                   B. Black  
 2   **quarterly revenue growth comparisons for the**  
 3   **Internet advertising market.**

4                   Have you seen these numbers before?

5                   MR. FOX: Objection.

6   BY MR. GESSER:

7                  Q. Have you seen --

8                  A. No, I have not.

9                  Q. Okay. If you look at '97 and -- 1997  
 10   and 1998 for the growth of the Internet  
 11   advertising market, do you see that there  
 12   appears to be an increase in the  
 13   quarter-over-quarter growth in the fourth  
 14   quarter of both 1997 -- 1998 and 1999. I'm  
 15   sorry. Focus on 1998 and 1999.

16                  MR. FOX: Objection.

17                  Are you representing that this  
 18   document is accurate?

19                  MR. GESSER: I'm just asking him what  
 20   the document says.

21                  A. If I look over the whole period of  
 22   this chart, I'm not seeing significant evidence  
 23   that the fourth quarter year over year figure is  
 24   higher than the third quarter.

25                  I'm seeing some evidence that the

1                   B. Black  
 2                  Q. Okay.  
 3                  All right. I'm going to show you  
 4   what we'll mark as Dayton-3. I'm sorry,  
 5   Black-3.  
 6                  (Defendants' Exhibit Black 3,  
 7   PricewaterhouseCoopers IAB Internet  
 8   Advertising Revenue Report, marked for  
 9   identification, as of this date.)

10                 MR. GESSER: This is what happens  
 11   when you have depositions back to back.

12   BY MR. GESSER:

13                  Q. Professor Black, have you seen this  
 14   document before?

15                  A. I have not.

16                  Q. Okay. I'm going to represent to you  
 17   this is the PricewaterhouseCoopers IAB Internet  
 18   Advertising Revenue Report and it shows revenue  
 19   that is generated from Internet advertising  
 20   across this whole spectrum of the Internet  
 21   advertising market, okay?

22                  A. Okay.

23                  MR. FOX: Objection.

24                  Q. If you look at page 7, it shows  
 25   historical revenue statistics, both annually and

1                   B. Black  
 2   quarter-over-quarter growth in the fourth  
 3   quarter is high relative to the third quarter,  
 4   so I'm seeing some evidence of seasonality in  
 5   online advertising.

6                  Q. Okay. And assuming that that  
 7   seasonality in online advertising translates  
 8   into seasonality in revenue for AOL during the  
 9   same time period --

10                 A. Okay.

11                 Q. -- then let's make that assumption,  
 12   then there would be seasonality in AOL's revenue  
 13   quarter-over-quarter such that one would expect  
 14   that the fourth quarter would be higher in  
 15   quarter-over-quarter growth than other quarters  
 16   and especially the third quarter.

17                 MR. FOX: Objection.

18                 A. For this data, you know, aggregate  
 19   Internet online, there is evidence of a  
 20   seasonally higher fourth quarter compared to the  
 21   preceding and subsequent quarters.

22                 Q. And is it reasonable to assume that  
 23   that would translate into seasonal fourth  
 24   quarter higher revenue for AOL in the 1998,  
 25   1999, 2000 time frame?

<p style="text-align: right;">Page 78</p> <p>1                   <b>B. Black</b>      2                   MR. FOX: Objection.      3                   Are you asking him whether looking at      4                   this chart indicates something for AOL or      5                   are you just asking the question      6                   independent of this chart?      7                   MR. GESSER: Independent of the      8                   chart. I'm asking him whether the data,      9                   assuming the data in this chart is      10                  accurate, is it reasonable to assume      11                  because of the revenue makeup of AOL in the      12                  1998, 1999, 2000 time frame, that to the      13                  extent that there's a trend in seasonality      14                  in online advertising, would that translate      15                  into a trend in seasonality in AOL's      16                  revenue for that time period.      17                  MR. FOX: Objection. Then you're      18                  not, then you're not asking him a question      19                  independent of the chart because you said,      20                  you started off by saying I'm asking      21                  something independent of the chart but then      22                  you said assuming the data in this chart is      23                  accurate, is it reasonable, et cetera so...      24                  MR. GESSER: You and I maybe have a      25                  different view of what independent means,</p>	<p style="text-align: right;">Page 79</p> <p>1                   B. Black      2                   but the question is the question.      3                   MR. FOX: Okay. Objection.      4                   You can answer.      5                   A. I would expect that if online      6                   advertising as a whole shows seasonality, that      7                   it would be likely that some portion of AOL's      8                   advertising would also show seasonality.      9                   The reason I qualify that was because      10                  one of the things that AOL was doing and      11                  publicly saying during this period was we're not      12                  as dependent as everybody else on short-term      13                  spot advertising contracts. We have these large      14                  multiyear, multiperiod deals. We have this \$3      15                  billion backlog.      16                  It might well be that the components      17                  of those larger deals and that backlog would be      18                  less seasonal than advertising revenue as a      19                  whole so I want to qualify my opinion in that      20                  regard; that the seasonality of the market as a      21                  whole might impact only some of AOL's own      22                  advertising and commerce revenue.      23                  <b>Q. And you didn't do that analysis.</b>      24                  A. I did not. I observed, as I said,      25                  some seasonality in AOL's results in the numbers</p>
<p style="text-align: right;">Page 80</p> <p>1                   <b>B. Black</b>      2                   that they had, but not enough so that I thought      3                   the quarter-over-quarter analysis was      4                   inappropriate or misleading.      5                  <b>Q. I'm sorry. I thought you had said</b>      6                  earlier that you saw no seasonality for AOL and      7                  some seasonality for Time Warner, but now you're      8                  saying that you saw some seasonality for AOL as      9                  well?      10                 MR. FOX: Objection.      11                 A. I believe that my prior testimony was      12                 that there was some seasonality for AOL and      13                 strong seasonality for Time Warner.      14                 <b>Q. Okay.</b>      15                 All right. So now going back to a      16                 question I asked you earlier, we've now been      17                 through I think the issue as to the fact that we      18                 only have two quarters of post bubble data that      19                 are much lower than the pre-tech bubble bursting      20                 data.      21                 We also went over the seasonality      22                 issue and I think at the beginning of all of      23                 this I was asking you, you know, if the 19      24                 percent number is absurd, what would be      25                 reasonable and you said you didn't do that</p>	<p style="text-align: right;">Page 81</p> <p>1                   <b>B. Black</b>      2                   analysis; is that right?      3                 A. That's correct.      4                 <b>Q. Okay. Nor did you look at what other</b>      5                 <b>analysts had as a quarter-over-quarter growth</b>      6                 <b>rate.</b>      7                 A. That's correct.      8                 <b>Q. Okay. So if I were to tell you that</b>      9                 <b>another analyst looking at all this data,</b>      10                 <b>considering whatever seasonality existed and</b>      11                 <b>considering the issue relating to the post</b>      12                 <b>bubble bursting number, so forth, came up with a</b>      13                 <b>number of ten percent as the</b>      14                 <b>quarter-over-quarter growth rate for AOL for the</b>      15                 <b>fourth quarter of 2000, would that number to you</b>      16                 <b>be absurd?</b>      17                 MR. FOX: Objection.      18                 A. No.      19                 <b>Q. Would it be unreasonable?</b>      20                 A. I would -- given the post bubble      21                 experience and the likelihood that we are now in      22                 a different framework, I would think that ten      23                 percent quarter-over-quarter growth would be      24                 highly optimistic but I'm not sure, you know, is      25                 it unreasonable, is it not unreasonable? It's</p>

<p style="text-align: right;">Page 82</p> <p>1                   <b>B. Black</b>    2 highly optimistic.    3                 I'd want to know more about vari --    4 quarter to quarter variability to form a    5 judgment on whether ten percent would have been    6 outside a range of reasonableness or, you know,    7 kind of within but toward the highly optimistic    8 end of that range.</p> <p>9                   <b>Q. Okay. Eleven percent?</b></p> <p>10          A. Again, I don't want to cut it that    11 finely. You know, once you're up in ten    12 percent, you're really stretching what seems to    13 me one could reasonably have expected at the    14 time based on what one knew about AOL in    15 particular, the market in general, the bursting    16 of the bubble, but I haven't done an analysis at    17 that level of detail where I want to say well,    18 10 percent is within the range of reasonableness    19 and 11 percent isn't.</p> <p>20          <b>Q. Okay. And I'm not trying to pin you</b>    21 <b>down, I just want to understand where your</b>    22 <b>confidence is.</b></p> <p>23          <b>You seem to be very confident at 19</b>    24 <b>percent is unreasonable, absurd.</b></p> <p>25          A. Yes.</p>	<p style="text-align: right;">Page 83</p> <p>1                   <b>B. Black</b>    2                   <b>Q. Are you very confident at 13 percent,</b>    3 <b>unreasonable and absurd?</b></p> <p>4          A. It would be hard for me based on what    5 I know about AOL and the advertising market and    6 what was known about its subscription revenue,    7 which was a lot of that was known intraquarter    8 because they were basically reporting sort of    9 every time they got an extra million    10 subscribers, they would tell the world and    11 people would count how many days since the last    12 million and so on. So one could have estimated    13 quite precisely, and it hadn't changed their    14 rates during this period, one could estimated    15 their subscription revenue quite precisely,    16 probably within a couple of percent margin of    17 error for the fourth quarter as of mid-January    18 of 2001 when you already knew their subscriber    19 counts.</p> <p>20          I haven't done that analysis but it    21 wouldn't be hard to do and I think I say in my    22 report that at this point subscription revenue    23 was 60 plus percent of total revenue, so that    24 would really limit the range of reasonable    25 numbers that one could, that one could come to.</p>
<p style="text-align: right;">Page 84</p> <p>1                   <b>B. Black</b>    2                 One would have a broader range of    3 potential numbers for advertising and commerce    4 revenue and you would have to put the two    5 together to form an overall sense of    6 reasonableness. And again, I tried to do that    7 subanalysis in the work that underlies this    8 report but didn't present it in the report.</p> <p>9                 And my guess is that if I say that    10 here's what I think I know about subscription    11 revenue, you probably could have pinned it down    12 to two percent, three percent growth at that    13 point pretty precisely. It was going to be two    14 percent or three percent, and it wasn't going to    15 be four and it sure wasn't going to be five and    16 say well, how much could advertising commerce    17 be? I don't see how you can get to 13. You    18 might be able to get to 10, but I don't see how    19 you could get to 13.</p> <p>20          But I don't think you do it at the    21 aggregate level, I think you do at first what do    22 I know about subscriptions and that what kind of    23 bump would it take in advertising commerce to    24 get you do that overall analysis.</p> <p>25          <b>Q. But you didn't do that analysis.</b></p>	<p style="text-align: right;">Page 85</p> <p>1                   <b>B. Black</b>    2                   <b>MR. FOX: Objection.</b>    3          A. I did. I did look at the separate    4 analysis for subscriptions and advertising    5 commerce revenue.</p> <p>6          <b>Q. And can you confidently say that</b>    7 <b>based on that analysis, that 13 percent would be</b>    8 <b>unreasonable and absurd?</b></p> <p>9          A. I want to say that as best I recall    10 the subscription numbers, so let me try to    11 recall this in my head a little bit. So suppose    12 you had 4 percent growth, which is at the high    13 range of what they might plausibly have gotten    14 for subscriptions for 60 percent of your    15 business, that would be 2.4 percent overall    16 growth and then you wanted to get to 13 percent,    17 that means you would need another 10.6 percent    18 growth coming out of 40 percent of your    19 business, which means you would need    20 quarter-over-quarter advertising growth    21 approaching 30 percent. I think that was the    22 analysis that I went through.</p> <p>23          It would be really hard to see how    24 you would get quarter-over-quarter advertising    25 growth rate of 30 percent. That's an</p>

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1                   **B. Black**  
 2 astonishing annual growth rate in the face of a  
 3 troubled online advertising market.

4                   I don't know that at that time I'd  
 5 want to make a stronger statement than that, but  
 6 certainly an online market that was no longer  
 7 growing at the kind of rate that you see in this  
 8 chart during 1996, '97, '98, '99.

9                   **Q. I've asked this now twice and I've**  
 10 **gotten very, very long answers so just I'm going**  
 11 **to ask it a third time.**

12                  **As you sit here today, do you have**  
 13 **confidence that you could say that a 13 percent**  
 14 **as opposed to a 19 percent quarter-over-quarter**  
 15 **growth rate for the fourth quarter of 2000 would**  
 16 **be absurd and unreasonable?**

17                  A. I think I would want to call it  
 18 unreasonable and I'm not sure I'd get to the  
 19 level of absurd.

20                  **Q. What about 12 percent?**

21                  MR. FOX: Objection.

22                  A. At a rough sense, again, this is off  
 23 the top of my head not having run the numbers,  
 24 not having looked at path variability, I'm not  
 25 prepared to say 10 percent was unreasonable and

1                   **B. Black**  
 2 I think I probably would say 12 percent was  
 3 unreasonable and 11 is kind of on the bubble,  
 4 but this is off the top of my head. These  
 5 aren't -- this isn't in my opinion and these  
 6 aren't, these aren't hard numbers.

7                   **Q. Okay.**

8                   **Okay. All right. So let's take a**  
 9 **look at this table now on page -- Table 1 on**  
 10 **page 9.**

11                  A. Of my report.

12                  **Q. Of your report.**

13                  **How do you get to the 19 percent?**

14                  **How do you calculate that that's what Kiggen was**  
 15 **predicting?**

16                  A. This, as I recall, was based on  
 17 estimates that were provided to Fidelity in  
 18 January of 2001. It was the basis for public  
 19 statements, although I don't know that these  
 20 precise numbers were publicly distributed.

21                  **Q. Okay. Would it be helpful if I gave**  
 22 **the Fidelity report so you can show me how you**  
 23 **got this number?**

24                  A. If you want, that would be fine.

25                  **Q. Well, it's up to you.**

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1                   **B. Black**  
 2 **If you can show me the number without**  
 3 **it, I'm happy to do it that way.**

4                   **If you need it to do the calculation,**  
 5 **I'm happy to give it to you.**

6                   **Whatever you think you need?**

7                  A. What my report says is that the  
 8 Fidelity number for America Online revenue has a  
 9 full year 2000 number. It doesn't have quarter  
 10 by quarter numbers, okay?

11                  **Q. Okay.**

12                  A. But we know what the quarter by  
 13 quarter numbers are for the first three quarters  
 14 because they're already public.

15                  **Q. Okay.**

16                  A. So I can take the full year number, I  
 17 can subtract the nine months number and back  
 18 into an estimate of what fourth quarter revenue  
 19 would have to be in order to get the year total  
 20 of 7959 in millions of dollars. That was the  
 21 calculation that --

22                  **Q. Can you just --**

23                  A. -- I went through.

24                  **Q. At the risk of spending a little math**  
 25 **time, but can you just actually just do that for**

1                   **B. Black**  
 2 **me just so I understand what you did; I mean**  
 3 **literally just take me through the calculation?**

4                  A. What I would have done is take the  
 5 7959 revenue estimate for the America Online  
 6 division --

7                  **Q. Yup.**

8                  A. -- and subtracted the known publicly  
 9 reported revenue for America Online for the  
 10 first three quarters of 2000, and that number  
 11 should be in Table 1 and we can see if that  
 12 works.

13                  **Q. So I'm just actually going to do that**  
 14 **right now if that's okay with you. I'm going to**  
 15 **do 7959 minus 1814; is that right? Minus 1885,**  
 16 **minus 1945 equals and I get 2315; is that**  
 17 **correct?**

18                  A. That's correct. We agree on how I  
 19 did that calculation.

20                  **Q. Right.**

21                  **And then I take 2315 and I divide it**  
 22 **by 1945 and I get 1.190, which translates into a**  
 23 **19 percent quarter-over-quarter growth.**

24                  A. That's correct and I believe that  
 25 that is the calculation that I did, and it's

<p style="text-align: center;">Page 90</p> <p>1                   B. Black      2 good that the numbers match. You can't say I      3 got my numbers wrong.      4     <b>Q. I am saying that you got your numbers</b>      5 <b>wrong but not yet.</b>      6     <b>So where do you get these numbers,</b>      7 <b>the first quarter, second quarter, third quarter</b>      8 <b>revenue from AOL?</b>      9     A. We certainly want to look over AOL's      10 public financial statements.      11    <b>Q. Okay. Let's take a look.</b>      12    <b>I'm going to represent to you these</b>      13 <b>are excerpts. The entire 10-K is enormous but</b>      14 <b>I'm going to represent to you these are</b>      15 <b>excerpts. If you want the entire 10-K, I can</b>      16 <b>give it to you, but here is marked as Exhibit --</b>      17 <b>marked as Exhibit Black-4 are AOL's 10-K issued</b>      18 <b>on March 27.</b>      19    A. It's not where these numbers would      20 have come from.      21       They would have come from the 10-Q.      22 It's possible that as part of a year-end audit      23 that intraquarter numbers moved around a little.      24    <b>Q. I'll just show you the exhibits,</b>      25 <b>you'll answer my questions and then we'll move</b></p>	<p style="text-align: center;">Page 91</p> <p>1                   <b>B. Black</b>      2 <b>around it. Is that okay?</b>      3     A. Okay.      4       (Defendants' Exhibit Black 4,      5 Excerpts from AOL's 10-K dated 3/21/00,      6 marked for identification, as of this      7 date.)      8 BY MR. GESSER:      9     <b>Q. This is Black Exhibit 4.</b>      10    <b>So if you see -- oh, great. I'm</b>      11 <b>going to show you -- I apologize the pages</b>      12 <b>aren't numbered, but if you look at the, what is</b>      13 <b>the third page, the signature page, it's dated</b>      14 <b>March 21st, 2000 --</b>      15    A. Let me look at the last page.      16    <b>Q. Okay.</b>      17    A. These numbers look like my numbers,      18 so what's the problem?      19    <b>Q. Okay. So these numbers match your</b>      20 <b>numbers, right?</b>      21    A. I'm looking at the last page of Black      22 Exhibit 4 and the row labeled "Total Revenues      23 for America Online Inc." and the numbers there      24 are 1814, 1885, 1945 and then for the full year      25 2059.</p>
<p style="text-align: center;">Page 92</p> <p>1                   B. Black      2     <b>Q. Okay. So these numbers match your</b>      3 <b>numbers?</b>      4     A. These numbers match my numbers.      5 That's good.      6     <b>Q. Well, the problem, as you asked, is</b>      7 <b>that these are restated numbers, okay? So this</b>      8 <b>is a restatement of AOL's numbers as of March</b>      9 <b>27, 2001.</b>      10    <b>If you look at the third page, in the</b>      11 <b>second paragraph under "Business</b>      12 <b>Combinations" --</b>      13    A. Okay.      14    <b>Q. -- it says, the last sentence says,</b>      15 <b>"Prior period financial statements have been</b>      16 <b>restated to give effect to the merger unless the</b>      17 <b>effect of the business combination is not</b>      18 <b>material."</b>      19       <b>Okay?</b>      20       <b>(Document review.)</b>      21    <b>Q. AOL had engaged in several business</b>      22 <b>combinations during the time period of 2000</b>      23 <b>prior to the merger with Time Warner and as a</b>      24 <b>result, AOL restated its revenue numbers on</b>      25 <b>March 27th, 2001 for the 2000 time period.</b></p>	<p style="text-align: center;">Page 93</p> <p>1                   <b>B. Black</b>      2     <b>Were you aware of that?</b>      3     A. I hadn't focused on this. I think      4 I'd go back to my earlier response and say this      5 is an effort to project what was knowable at      6 January 2001 and for that purpose, what would be      7 knowable would be something that was published.      8 The most recent 10-Q would be probably be a good      9 source of information.      10    <b>Q. Okay. Let's take a look at the most</b>      11 <b>recent 10-Q that was available would have been</b>      12 <b>what? It would have been November, the third</b>      13 <b>quarter 2000 10-Q; is that right?</b>      14    A. Correct.      15    <b>Q. Okay. Let's look at that third</b>      16 <b>quarter 2000 10-Q.</b>      17       MR. GESSER: This is Black 5.      18       (Defendants' Exhibit Black 5,      19 Excerpts from AOL's 10-K dated 11/30/00,      20 marked for identification, as of this      21 date.)      22 BY MR. GESSER:      23    <b>Q. Okay. So if you turn to I think it's</b>      24 <b>probably flagged for you as well, but it's the</b>      25 <b>one, two, three, fourth page in. It has revenue</b></p>

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1                   **B. Black**  
 2   **numbers.**  
 3                   **(Document review.)**  
 4   A. Okay.  
 5   **Q. It's got a third quarter revenue**  
 6   **number for AOL for 2000.**  
 7                   **Do you see that number?**  
 8   A. Yes.  
 9   **Q. What is that number?**  
 10 A. Total third quarter revenue is 1975.  
 11 **Q. Okay. So that's different than what**  
 12 **you have as the total third quarter revenue.**  
 13 A. Oh, for third quarter 2000?  
 14 **Q. Yes.**  
 15 A. I have 1945 and this is 1975.  
 16 **Q. Do you understand why you may have**  
 17 **that discrepancy?**  
 18 A. I could speculate, but since I  
 19 thought I was using the correct numbers that  
 20 were knowable at the time and it now looks like  
 21 I may have been using numbers from a different  
 22 source that were slightly different, I would  
 23 have to speculate as to what the causes of the  
 24 discrepancy are.  
 25 **Q. Okay. So why don't you speculate**

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1                   **B. Black**  
 2   question.  
 3   A. I would be speculating and I'm  
 4   willing to speculate if you want me to  
 5   speculate.  
 6   **Q. Okay. I am looking for you to**  
 7   **speculate.**  
 8   A. It might be that the numbers that I  
 9   used, and they might well have come out of the  
 10 10-K because I don't recall exactly where they  
 11 came from, in part because I developed them from  
 12 my earlier AOL report which would have been a  
 13 couple of years back so my memory is not that  
 14 precise as to exactly where the numbers came  
 15 from, it might be that the, let me call them the  
 16 10-K numbers which appear consistent with the  
 17 numbers that I used exclude intracompany  
 18 transactions between America Online and Time  
 19 Warner, while the quarterly numbers that were  
 20 reported by America Online prior to the merger  
 21 would not exclude intracompany transactions. So  
 22 that feels to me like a plausible speculation as  
 23 to a possible basis for the difference.  
 24 **Q. Okay. Now having seen that**  
 25 **discrepancy, what do you think is the**

1                   **B. Black**  
 2   **what the cause of the discrepancy is?**  
 3   MR. FOX: I don't think you want him  
 4   to speculate. What's the point of his  
 5   speculation?  
 6   If you have some -- first of all, I  
 7   didn't understand the question.  
 8   Are you asking him to say what the  
 9   difference is between the restated number  
 10 and the number that's in Black Exhibit 5?  
 11 MR. GESSER: I'll ask the question.  
 12 BY MR. GESSER:  
 13 **Q. Here's the question: I think you**  
 14 **just have indicated the right place to look for**  
 15 **the numbers for this calculation would be the**  
 16 **third quarter 10-Q for 2000 for AOL, which I now**  
 17 **have shown you which has a number of 19 -- 1975**  
 18 **for the third quarter AOL revenue and that's a**  
 19 **different number than you have for your third**  
 20 **quarter AOL revenue, and I'm asking you why it**  
 21 **is that you have a different number than the**  
 22 **number that I think you had just indicated was**  
 23 **the correct number to use for this calculation?**  
 24 MR. FOX: Objection.  
 25 You may answer if you understand the

1                   **B. Black**  
 2   **appropriate number to use for your calculation**  
 3   **for the third quarter 2000 AOL revenue?**  
 4   A. I would want to use the 1975 number  
 5   that is in the 10-Q unless there was some reason  
 6   at the time to think that that number was not  
 7   accurate. But based on the information I have  
 8   now, I would be inclined to think that 1975  
 9   would be the right number to use.  
 10 **Q. Okay. So I'm going to ask you then**  
 11 **above in your report, do you have a pen?**  
 12 **I'll provide you with one.**  
 13 **I'm going to ask you to now write**  
 14 **1975 above 3Q 2000 in your report so you've got**  
 15 **that number there.**  
 16 A. I don't want to write it on the  
 17 official copy, if you will, but if you give me a  
 18 piece of paper --  
 19 **Q. No, I'm actually going to ask you to**  
 20 **write it on the copy because this is going to**  
 21 **get -- because I want this to be part of the**  
 22 **exhibit.**  
 23 A. Okay. As instructed, I'm going to  
 24 write 1975 for the third quarter of 2000.  
 25 I will observe that at this point it

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1                   B. Black  
 2 is possible that the numbers for first quarter  
 3 and second quarter of 2000 are also different  
 4 than the numbers in my report, and we have not  
 5 yet confirmed whether the fourth quarter of 2000  
 6 number which is in my report is before or after  
 7 restatement, so I don't know yet whether the  
 8 2059 should be compared to 1945 or to 1975.

9           **Q. Okay. We're actually going to go**  
 10 **right through that right now, so the**  
 11 **anticipation will not have to be in place for**  
 12 **too much longer.**

13          A. Okay.

14          **Q. So let's take a look. If you were to**  
 15 **try and find out what the number is, the right**  
 16 **number is to plug in for 1Q 2000 and 2Q 2000,**  
 17 **where would you look for that?**

18          A. The first place that I would look  
 19 would be to the 10-Qs for those periods.

20          **Q. Okay.**

21          A. One would also, it would be common to  
 22 find that the third quarter financial statements  
 23 include a nine month number as well, which would  
 24 give you a basis for verifying that nothing  
 25 changed by the end of the third quarter. I'm

1                   B. Black  
 2 actually not seeing those here.  
 3           **Q. Do you know what AOL's fiscal year**  
 4 **was during this time period?**

5          A. Oh, yeah. That's right. It was a  
 6 June 30th fiscal year. That's why we're only  
 7 seeing the three month numbers.

8           **Q. So if we were to look at the 10-K for**  
 9 **previous year, that would also give you the**  
 10 **numbers, right?**

11          A. So what you would want to look at is  
 12 their fiscal 2000 10-K, which would have come  
 13 out in the fall of 2000 if it has the quarterly  
 14 numbers in it and it might.

15          **Q. So let's take a look at Black-6.**

16          **(Defendants' Exhibit Black 6,**  
 17 **Excerpts from AOL's 10-K, dated 6/30/00,**  
 18 **marked for identification, as of this**  
 19 **date.)**

20          **BY MR. GESSER:**

21          **Q. So there's a flagged page here and**  
 22 **it's buried deep close to the end of the report,**  
 23 **gives you revenue numbers for --**

24          A. I've got it.

25          **Q. You've got it?**

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Page 101

1                   **B. Black**

2          A. Yes.

3          **Q. I just wanted for the record to**  
 4 **indicate what we're talking about here.**

5          A. Note 17, which is quarterly  
 6 information unaudited to the fiscal 2000 10-K.

7          **Q. Okay. So now we've got the quarter**  
 8 **ending March 31st and June 30th which correspond**  
 9 **to a first quarter 2000 and second quarter 2000**  
 10 **revenue number?**

11          A. With your permission, I'll just put  
 12 the numbers in for the four periods that are  
 13 reported here.

14          **Q. Well, can you just say what the**  
 15 **number you have recorded and then what the**  
 16 **number you're putting in as what you now view to**  
 17 **be the correct number for your calculation.**

18          A. Okay.

19          MR. FOX: Objection.

20          A. So what I'm going to do, and I'll do  
 21 it on the exhibit if you want --

22          **Q. Yeah.**

23          A. -- is take the four quarters included  
 24 in fiscal 2000 and report that for the third  
 25 calendar quarter of '99, which is the first

1                   B. Black

2 fiscal quarter of 2000, the reported number  
 3 there in the 10-K is 1477 versus the 1463 in my  
 4 report.

5          **Q. Okay.**

6          A. In the fourth quarter of calendar  
 7 '99, which is the second fiscal quarter of 2000,  
 8 the number is 1633 versus the 1618 in my report.  
 9           In the first quarter of calendar

10 2000, which is the third quarter of fiscal 2000,  
 11 the number is 1847 versus the 1814 in my report.

12           And in the second quarter of calendar  
 13 2000, which is the fourth quarter of fiscal  
 14 2000, the number is 1929 versus the 1885 in my  
 15 report.

16           And if you'd like me to, I can then  
 17 compute the quarter-over-quarter growth rates as  
 18 well.

19          **Q. Well, what I'd like you to do is also**  
 20 **now tell me, you had Kiggen's projection for**  
 21 **fourth quarter 2000, based on your calculation,**  
 22 **as 2315; is that right?**

23          A. Yes.

24          **Q. Okay. So I'd like you to tell me**  
 25 **what, based on what I think we agree now are the**

1                   **B. Black**  
 2 correct numbers to be using, what would be your  
 3 projection for Kiggen's -- for what you think  
 4 Kiggen's projection was --  
 5       A. Got it.  
 6       Q. -- and then what Kiggen's growth  
 7 projected was.  
 8       A. Okay.  
 9       MR. FOX: Objection.  
 10      A. So he was projecting 7959? 7959.  
 11     And then I'm going to subtract from that 1975,  
 12 I'm going to subtract 1929, I'm going to  
 13 subtract 1847 and I'm going to get 2208, okay?  
 14      Q. So that should go in place of 2315?  
 15      A. Correct.  
 16      Q. Now you're dividing that number by  
 17 1975; is that right?  
 18      A. That's right.  
 19      Q. And what does that give you?  
 20      A. That's going to give me a fourth  
 21 quarter revenue estimate of 2208 and a  
 22 quarter-over-quarter projected growth of 11.8  
 23 percent.  
 24      Q. Now having been through that  
 25 exercise, if you were to issue your report

1                   **B. Black**  
 2 sitting here today, you want to cross out the  
 3 word "absurd" and write "highly optimistic"?  
 4 Would that be --  
 5       A. I think that's a fair statement --  
 6       Q. Okay.  
 7       A. -- based on not yet having done the  
 8 further work.  
 9       Q. Okay.  
 10      A. I'm happy to do that.  
 11      Q. Would you --  
 12      A. I would also of course have to change  
 13 the quarter-over-quarter growth rates for the  
 14 second and third quarters of 2000, which I'm now  
 15 computing as being 4.4 percent in the second  
 16 quarter and 2.4 percent in the third quarter.  
 17      Q. And going back, you'd have to also  
 18 change the third quarter '99, fourth quarter '99  
 19 and first quarter 2000 quarter-over-quarter  
 20 growth rates as well; is that right?  
 21      A. Yes.  
 22       And I have marked, at least subject  
 23 to having punched the wrong buttons, what those  
 24 growths rates are on the exhibit.  
 25      Q. So what is the fourth quarter '99

1                   **B. Black**  
 2 today, would you be issuing your report with  
 3 these numbers?  
 4       MR. FOX: Objection.  
 5       A. To the best of my knowledge as I sit  
 6 here today, yes.  
 7       Q. So then what that would also do is  
 8 require you in the first full paragraph of the  
 9 report on page 9 to change the number in the  
 10 last sentence from 19 percent to 11.8 percent;  
 11 is that correct?  
 12      A. Yes.  
 13      Q. Okay. Would you keep the sentence  
 14 the same "Against this backdrop, Kiggen was  
 15 projecting an absurd..." now 11.8 percent  
 16 "...quarter-over-quarter growth"?.  
 17      A. No.  
 18      Q. Okay. So as you sit here today, what  
 19 would you do with that sentence?  
 20      A. I think I would describe it as highly  
 21 optimistic and I would want to go back and do  
 22 the subanalysis of subscription and ad com  
 23 revenue to form a judgment on whether it is so  
 24 highly optimistic as to be unreasonable.  
 25      Q. Okay. So to be accurate for now

1                   **B. Black**  
 2 quarter-over-quarter growth rate, was 10.6, now  
 3 what is it?  
 4       A. 10.6.  
 5       Q. It stays 10.6?  
 6       A. Yes.  
 7       Q. And first quarter 2000?  
 8       A. It becomes 13.1.  
 9       Q. Okay. On page 10 of your report you  
 10 say that, "Kiggen instead projected that AOL's  
 11 market share would jump from 27 percent in 2000  
 12 to 41 percent in 2001 and then keep climbing to  
 13 60 percent in 2005."  
 14      A. Yes.  
 15      Q. And then you write, "This was highly  
 16 unlikely. It required AOL to grow rapidly in  
 17 2001 while all other online advertising was  
 18 shrinking and then follow up this performance by  
 19 capturing over 70 percent of all growth in the  
 20 online advertising for the next four years."  
 21       So do you agree with that statement?  
 22      A. Yes.  
 23      Q. You get those numbers, the 27  
 24 percent, the 41 percent and the 60 percent, you  
 25 get those numbers again from the Fidelity

<p style="text-align: center;">Page 106</p> <p>1           <b>B. Black</b>    2 <b>presentation; is that right?</b>    3   A. Yes.    4   <b>Q. Did you compare Kiggen's projections</b>    5 <b>for the -- well, strike that.</b>    6   <b>Did you, in forming your opinion that</b>    7 <b>this was highly unlikely, did you look to see</b>    8 <b>what the actual growth of online advertising was</b>    9 <b>in the 2000 to 2005 time frame?</b>    10   MR. FOX: Objection.    11   A. I was situating myself in January of    12 2001, at which time the future growth rate in    13 the total online advertising market was not    14 known.    15   I did not form a view that the    16 projections for roughly 25 percent annual growth    17 over 2002 through 2005 were unreasonable, so I    18 was, if you will, accepting those as the base    19 for further analysis.    20   <b>Q. So Kiggen's projections for the total</b>    21 <b>online advertising market growth from 2000 to</b>    22 <b>2005 were reasonable. What he was unreasonable</b>    23 <b>about was how much of that AOL would capture?</b>    24   A. My strong suspicion is that the    25 numbers for the total online ad market were</p>	<p style="text-align: center;">Page 107</p> <p>1           <b>B. Black</b>    2 numbers that he took from somewhere else rather    3 than being his own numbers.    4   And I guess I'm perfectly happy to    5 say that at that time I have no reason to think    6 that those overall numbers were unreasonable or    7 if you prefer to say that they were reasonable,    8 I'm happy to say that...    9   <b>Q. You're happy to say --</b>    10   A. Somehow I'm happier saying I have no    11 reason to think they were unreasonable.    12   <b>Q. Okay.</b>    13   A. It feels like saying affirmatively    14 that they're reasonable requires a bit more    15 information than I have.    16   <b>Q. And did you check to see whether in</b>    17 <b>fact those numbers, and when I say "those</b>    18 <b>numbers" I mean the growth in the online</b>    19 <b>advertising market, actually turned out to be</b>    20 <b>accurate for this time period?</b>    21   MR. FOX: Objection. Asked and    22 answered.    23   A. I did not.    24   <b>Q. And did you check to see whether</b>    25 <b>other analysts had similar growth projections</b></p>
<p style="text-align: center;">Page 108</p> <p>1           <b>B. Black</b>    2 <b>for AOL's share of the total online advertising</b>    3 <b>market in this time period?</b>    4   A. I did not.    5   <b>Q. And if other analysts, prestigious</b>    6 <b>analysts such as Mary Meeker at Morgan Stanley,</b>    7 <b>had growth rates for AOL's share of the total</b>    8 <b>online advertising market that were consistent</b>    9 <b>with Mr. Kiggen's view as expressed in the</b>    10 <b>Fidelity presentation that you looked at, would</b>    11 <b>that in any way change your view as to whether</b>    12 <b>this growth that is exhibited in your Table 2</b>    13 <b>was highly unlikely at the time?</b>    14   MR. FOX: Objection.    15   A. I think that I'd want to know more    16 about what other analysts thought and the basis    17 for those beliefs.    18   It would certainly have been possible    19 at the cost of a much larger effort than I    20 undertook to systematically review the views of    21 other analysts and see whether they contain that    22 information, and I didn't do that work.    23   And if other analysts were also    24 developing numbers that I have called here,    25 quote, highly unlikely, close quote, then I'd be</p>	<p style="text-align: center;">Page 109</p> <p>1           <b>B. Black</b>    2 puzzled and want to understand the basis for    3 those numbers.    4   MR. GESSER: I'm going to mark as    5 Black-7, this is an analyst report from    6 Morgan Stanley Dean Witter on January 19th,    7 2001.    8   (Defendants' Exhibit Black 7, Morgan    9 Stanley Dean Witter Analyst Report dated    10 1/19/01, marked for identification, as of    11 this date.)    12 BY MR. GESSER:    13   <b>Q. By the way, do you know what the date</b>    14 <b>of the Fidelity presentation that you looked at</b>    15 <b>was?</b>    16   A. It was around January 20th.    17   <b>Q. Around the same time?</b>    18   A. This is around the same time frame,    19 yes.    20   <b>Q. Is yours flagged? If you look at</b>    21 <b>page 111.</b>    22   MR. FOX: I mean I would --    23 objection. I would just say if the witness    24 appears to be reviewing the document, that    25 if you take time to review it --</p>

1                   **B. Black**  
 2       A. I don't have a page 111. I have a  
 3       32-page report.  
 4       **Q. You're probably looking at the top.**  
 5       **If you're looking at top, it's page 19.**  
 6       **If you're looking at the bottom**  
 7       **right, it's page 111.**  
 8       A. So at least I want to see what is --  
 9       MR. FOX: I don't see any numbers on  
 10      the bottom right.  
 11 BY MR. GESSER:  
 12      **Q. Okay. I'm sorry then. It may have**  
 13      **be that they got cut off in the copying.**  
 14      The bottom -- the top right, page 19,  
 15      is that --  
 16      MR. FOX: I think the witness is  
 17      looking at other parts of the document.  
 18      MR. GESSER: Okay. The witness can  
 19      look at whatever part --  
 20      A. Yeah. I just want to see what's in  
 21      here before I respond on a particular...  
 22      (Document review.)  
 23      A. Okay.  
 24      **Q. I'm not sure it's going to be**  
 25      **fruitful for us to spend the time crunching**

1                   **B. Black**  
 2       MR. FOX: Objection.  
 3       A. Well, the numbers are substantially  
 4      different.  
 5       It is the case that the Morgan  
 6      Stanley Dean Witter report by Mary Meeker and  
 7      others is projecting strong growth in AOL  
 8      Internet advertising both in absolute dollars  
 9      and as a, and as a share of the market, but is  
 10     not projecting the same percentage capture of  
 11     growth in the market and is not projecting the  
 12     same 2005 terminal market share.  
 13      **Q. It's not the same but it's actually**  
 14      **higher, isn't it?**  
 15      A. I don't believe so. So I'm looking  
 16     at Meeker projecting that AOL in 2005 will have  
 17     42 percent of a \$16 billion market versus Kiggen  
 18     estimating 60 percent of a \$21 billion market.  
 19     I'm not entirely sure why they seem to be using  
 20     different, different starting numbers.  
 21      So Meeker may be backing out commerce  
 22     revenue and looking only at Internet  
 23     advertising. She seemed to have different  
 24     starting numbers than Kiggen and, you know, I'd  
 25     have to go back and understand that. She's

1                   **B. Black**  
 2       **these numbers, but if you look at page 19, this**  
 3       **has results for the total Internet advertising**  
 4       **market.**  
 5       It's also got results for what  
 6      Ms. Meeker and others at Morgan Stanley view as  
 7      being their projections going through 2005 of  
 8      the Time Warner advertising revenue, the AOL  
 9      advertising revenue and so forth.  
 10      A. Yup.  
 11      **Q. And I think we can crunch these**  
 12      **numbers to get projections that are similar, at**  
 13      **least in kind, to the projections that you're**  
 14      **attributing to Mr. Kiggen in Table 2.**  
 15      And I'm wondering if we were to do  
 16      that and we were to find that her projections  
 17      about the growth of AOL's share in the market  
 18      and so forth were similar to Mr. Kiggen's, would  
 19      that affect in any way your report or any of the  
 20      conclusions that you reached in your report  
 21      regarding the likelihood or the reasonableness,  
 22      the likelihood of these numbers coming to bear  
 23      or the reasonableness of Mr. Kiggen's position  
 24      as reflected in these numbers on the chart in  
 25      Table 2?

1                   **B. Black**  
 2      projecting strong growth in market share but  
 3      she's not projecting a 62 percent terminal  
 4      market share and she's not projecting that  
 5      they're going to capture 70 plus percent of the  
 6      incremental growth.  
 7      **Q. It depends on --**  
 8      A. But look, she's -- these are  
 9      optimistic numbers as well.  
 10     **Q. Okay. And if you look -- if you look**  
 11     **at the third line in the AOL Time Warner**  
 12     **advertising and direct marketing revenue, take**  
 13     **the third line under that heading, which is "AOL**  
 14     **Internet Advertising and e-Commerce" and in**  
 15     **brackets "100 percent" --**  
 16      A. Yes.  
 17      **Q. -- and you take a look at that number**  
 18      **which is 13.9 --**  
 19      A. Right.  
 20      **Q. -- that's obviously a much larger**  
 21      **percentage of the total Internet advertising**  
 22      **market than 42.5 percent, right?**  
 23      A. Well, that -- okay. So that is  
 24      consistent with my speculation that she was  
 25      comparing AOL Internet advertising to the